

2010

Charles F. Hale, Beverly I. Hale v. Big H.
Construction, Inc. T. Dwayne Horsley v.
Citimortgage, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHARLES F. HALE and BEVERLY I.
HALE, husband and wife,

Plaintiffs and Appellants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and T. DWAYNE HORSLEY,
an individual,

Defendants and Appellees

vs.

CITIMORTGAGE, INC., a Delaware
corporation; Citibank Federal Savings
Bank, a federally chartered savings bank;
and John Does I-V,

Third-Party Defendants and
Appellant.

Case No. 20100785-SC

*On Appeal From
Third District Court for Salt Lake
County, State of Utah,
Civil No. 050905279, District Court
Judge Sandra N. Peuler*

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INTRODUCTION

Plaintiffs and Appellants Charles F. Hale and Beverly I. Hale, by counsel and pursuant to Rule 24, Utah Rules of Appellate Procedure, submit the following opening brief in connection with the above-entitled proceeding.

Plaintiffs/Appellants Charles F. Hale and Beverly I. Hale appeal from the trial court's Findings of Fact and Conclusions of Law and Judgment entered May 25, 2010 (R. 2105-2162), and from the trial court's Order (1) denying Hales' Motion for a New Trial, (2) denying Hale's Motion to Amend Findings of Fact, Conclusions of Law and Judgment, and (3) granting Judgment for Additional Attorneys' Fees and Costs, entered September 27, 2010 (R. 2688-92).

Following trial to the Court on August 10, 12-14 and October 27-29, 2009, the Court issued a minute entry ruling dated February 8, 2010 (R. 1722-34), in which she found for Defendant/Appellee Big H Construction on the claims of its counterclaim, and against Plaintiffs/Appellants Charles F. Hale and Beverly I. Hale on the claims of their complaint. Appendix at Attachment 1. The Court's Findings of Fact, Conclusions of Law and Judgment were both entered May 25, 2010. Appendix at Attachments 2 and 3.

Plaintiffs/Appellants moved for a new trial, or to amend Findings of Fact, Conclusions of Law and Judgment, pursuant to Rules 52(b) and 59, Utah Rules of Civil Procedure, on June 8, 2010. Appendix at Attachment 4. On September 27, 2010, the Court entered its Order (1) denying Hales' Motion for New Trial, (2) denying Hale's

Motion to Amend Findings of Fact, Conclusions of Law and Judgment; and (3) granting Judgment for Additional Attorneys' Fees and Costs. Appendix at Attachment 5.

Plaintiffs/Appellants filed their initial Notice of Appeal on September 10, 2010. Appendix at Attachment 6. Plaintiffs/Appellants filed an Amended Notice of Appeal following the Court's Order of September 27, 2010 (Appendix at Attachment 4) on September 30, 2010. Appendix at Attachment 7.

JURISDICTIONAL BASIS FOR APPEAL

This is an appeal from a final judgment of the Third Judicial District Court for Salt Lake County, State of Utah, entered in favor of Defendant/Appellee Big H Construction Company and against Plaintiffs/Appellants Charles F. Hale and Beverly I. Hale on May 25, 2010, and from the trial court's denial of post-trial motions by order dated September 27, 2010. Appeal was initially taken to the Supreme Court for the State of Utah, which thereafter assigned the matter to the Utah Court of Appeals. Jurisdiction obtains pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND

STANDARD OF REVIEW

1. Whether the trial court erred in accepting testimony based on estimates rather than an actual accounting as proof that "costs" in a cost-plus building contract were reasonable and thereby ruling that Big H proved its lien and contract claims. This is a question of law. *See Freeman & Co. v. Bolt*, 968 P.2d 247, 254 (Idaho App. 1998). Such questions are reviewed for correctness. *See Hillcrest Inv. v. Sandy City*, 2010 UT

App 201, ¶ 7, 238 P.3d 1067. Preserved at R. 2797 at 9-14; 1877-79, 1880, 1881, 1750, 1751.

2. Whether the trial court erred in awarding Big H a ten percent profit on the sale of the land where there was no writing permitting such a recovery. This is a question of law reviewed for correctness. *See Hillcrest Inv. v. Sandy City*, 2010 UT App 201, ¶ 7, 238 P.3d 1067. Preserved at R. 1745-1747, 1751, 1753, 1863-1867, 1876.

3. Whether the trial court permitted Big H to recover unreasonable costs in that it permitted Big H to recover from duplicated and mistaken invoices, to recover the full value of underpaid invoices, and to recover the full payment when Big H overpaid invoices. The trial court's findings of fact are reviewed under a clearly erroneous standard, but the trial court is granted no deference in its conclusions of law. *See Low v. City of Monticello*, 2004 UT 90, ¶ 11, 103 P.3d 130. Preserved at R. 1753, 1756, 1874, 1876-1878.

4. Whether the trial court erred in finding that Plaintiffs/Appellants had no warranty claim for defective workmanship by Defendants/Appellees. The trial court's findings of fact are reviewed under a clearly erroneous standard, but the trial court is granted no deference in its conclusions of law. *See Low v. City of Monticello*, 2004 UT 90, ¶ 11, 103 P.3d 130; *Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668. Preserved at R. 1869-1870, 1879.

5. Whether the trial court committed reversible error in concluding that a \$30,000 payment to Big H "foreman" James Horsley should not be credited to the Hales as a

payment to Big H on the Project. This question turns on whether James Horsley acted with actual or apparent authority, which is a mixed question of law and fact determined under correctness and a clearly erroneous standards, respectively. *See Glen v. Ohio Sav. Bank*, 2007 UT 56, ¶ 19, 181 P.3d 791. Preserved at R. 1754, 1180-1885.

6. Whether the trial court erred in failing to find that Defendants'/Appellees' Notice of Mechanic's Lien violated Utah Code Ann. § 38-1-25; if so, whether the trial court erred in failing to award to Plaintiffs/Appellants judgment in an amount equal to twice the difference between the face amount of the lien and the amount (if any) actually owed Defendants/Appellees under the parties' agreements. The trial court's findings of fact are reviewed under a clearly erroneous standard, but the trial court is granted no deference in its conclusions of law. *See Low v. City of Monticello*, 2004 UT 90, ¶ 11, 103 P.3d 130. Preserved at R. 1752-1753, 1757, 1879-1880, 1886.

7. Whether the trial court correctly determined that Big H was the prevailing party for purposes of awarding costs and attorneys' fees. "A trial court's decision to award the prevailing party its costs will be reviewed under an abuse of discretion standard." *Stevensen 3rd East, LC v. Watts*, 2009 UT App 137, ¶ 27, 210 P.3d 977. Preserved at R. 1757, 1887.

CITATION OF DETERMINATIVE AUTHORITIES

Utah Code Ann. § 38-1-25.

STATEMENT OF THE CASE

This action arose out of Defendants'/Appellees' construction of two homes on Lots 45 and 46, Triple Crown Estates, a subdivision located in Salt Lake County, State of Utah, pursuant to "cost-plus-ten-percent" contracts. Defendants/Appellees abandoned the project in December of 2004, and thereafter asserted a Notice of Mechanic's Lien against Lot 45, claiming the right to additional payment of \$165,000.00.

Plaintiffs/Appellants filed a Complaint on March 21, 2005, seeking an accounting of actual costs incurred in the construction project, a declaration that they were not indebted to Defendants/Appellees thereon, damages for misrepresentation¹, damages for breach of contract, damages for slander of title, and right of recovery under Utah Code Ann. § 38-1-25 (2) (R. 1-34). Defendant/Appellee Big H Construction filed an Answer, Counterclaim and Third-Party Complaint on August 4, 2005 seeking damages for breach of the parties' construction contract, for a decree of foreclosure of its mechanic's lien against Lot 45, Triple Crown Estates, and a declaration that its lien was prior in time and right to the trust deed interest of Third-Party Defendant Citimortgage therein (R. 52-82).

The case was tried to the court commencing August 10, 2009, and thereafter on August 12-14 and October 27-29, 2009. At the closing of Plaintiffs'/Appellants' case in chief, Defendants/Appellees moved the court for an order dismissing

¹ No appeal is taken from the court's order dismissing misrepresentation claims.

Plaintiffs'/Appellants' misrepresentation claims, which motion was granted by Minute Entry dated December 29, 2009 (R. 1564-66.).

In a 13-page Minute Entry issued on February 8, 2010 (R. 1722-34, Appendix and Attachment 1), the trial court (1) dismissed claims against Defendant/Appellee T. Dwayne Horsley individually, (2) held that Plaintiffs/Appellants had failed to prove that Defendants/Appellees had breached the construction contracts on Lots 45 and 46, Triple Crown Estates, (3) held that Plaintiffs/Appellants failed to prove that Defendants/Appellees breached the construction contracts requiring them to build the homes according to plans and specifications, (4) held that Plaintiffs/Appellants had failed to prove that Defendants/Appellees had breached the construction contracts failing to complete work on the homes in a good and workmanlike manner, (5) held that Plaintiffs/Appellants had failed to prove that Defendants/Appellees breached the contract by overcharging for the homes' construction, (6) held that Defendants/Appellees had demonstrated that the costs incurred in the construction of the home on Lot 45 were reasonable, and that Plaintiffs/Appellants breached the contracts by refusing to pay the sum owed, (7) held that the mechanic's lien asserted by Defendants/Appellees against Lot 45 was valid, and (8) held that Defendant/Appellee Big H Construction Company's mechanic's lien had priority over Third-Party Defendant Citimortgage's deed of trust. Appendix at Attachment 1.

The court instructed Defendants/Appellees to prepare proposed findings of fact and conclusions of law.² Both Third-Party Defendant Citimortgage and Plaintiffs/Appellants objected to Defendants'/Appellees' proposed findings and conclusions (R. 1739-58, 1833-43, 1858-90); however, on May 17, 2010, the trial court adopted Defendants'/Appellees' proposed findings and conclusions, even where they deviated from her Minute Entry ruling (R. 1722-34, Appendix at Attachment 1). Appendix at Attachment 2, R. 2105-62. On the same date, the court entered judgment in favor of Defendant/Appellee Big H Construction and against Plaintiffs/Appellants as follows:

- A. \$172,100.00, representing additional amounts claimed by Defendant/Appellee Big H Construction on the construction project;
 - B. Interest at 10% on the judgment from December 1, 2004 to the date of judgment, and thereafter at the rate of 2.41% per annum until paid;
 - C. Costs and attorneys' fees of \$342,240.84, together with interest at 2.41% per annum until paid in full; and
 - D. An order and decree of foreclosure of Defendant/Appellee Big H Construction Company's mechanic's lien against Lot 45, Triple Crown Estates.
- Appendix at Attachment 2, R. 2163-66.

² Defendants/Appellees actually prepared two sets of findings of fact and conclusions of law, one submitted January 4, 2010 (R. 1685-1720), and one submitted February 17, 2010 (R. 2068-98).

Upon motion, and the posing of a bond in the amount required by the court, Plaintiffs/Appellants obtained a stay of execution of judgment pending appeal by order dated May 28, 2010 (R. 2649-52).

On June 8, 2010, Plaintiffs/Appellants moved the court, pursuant to Rule 59, Utah R. Civ. P., for a new trial or to alter or amend the findings and conclusions entered herein (Appendix at Attachment 3, R. 2210-2225). Following briefing and argument, the court denied Plaintiffs'/Appellants' motion for a new trial, as well as their motion to amend findings of fact, conclusions of law and judgment, and granted Defendant/Appellee Big H Construction additional attorneys' fees, all by order dated September 27, 2010 (Appendix at Attachment 5, R. 2688-92).

Plaintiffs/Appellants filed their initial Notice of Appeal on September 10, 2010 (Appendix at Attachment 6, R. 2632-34); following the court's ruling on their motion for a new trial or to amend findings of fact, conclusions of law and judgment, Plaintiffs/Appellants filed an Amended Notice of Appeal on September 30, 2010 (Appendix at Attachment 7, R. 2693-95).

STATEMENT OF FACTS

1. Summary of Facts.

1. Plaintiffs Charles ("Chuck") F. Hale and Beverly I. Hale ("Hales") are a married couple who contracted with Defendant Big H for the construction of two houses to be built on adjoining lots. R. 2797 at 53, 56.

2. Defendant Big H Construction, Inc. ("Big H") is a Utah corporation, which primarily specialized in residential construction. R. 2801 at 8, 11.

3. Chuck Hale testified that in approximately January or February of 2003, the Hales began to have preliminary discussions with Big H about building two houses for the Hales on Lots 45 and 46, Triple Crown Estates Subdivision, located in Salt Lake County, State of Utah. R. 2797 at 54-55, 57-58.

4. Defendant T. Dwayne Horsley is an individual who, at all times relevant, was President of Big H Construction. R. 2801 at 4-5.

5. James Horsley, Dwayne Horsley's brother, served at various times as the foreman, a project manager for Big H, and a promoter of home sales for Big H. R. 2801 at 13, 14, 49.

6. Dwayne and James had agreed to split the profits on the Hales' project. R. 2801 at 14-15.

7. Hales wanted two houses so that their granddaughter would be nearby. R. 2797 at 55.

8. Chuck and Beverly Hale obtained pre-drawn architectural drawings and made changes on these drawings. R. 2797 at 60-61. The Hales both testified that they were certain that they gave Big H the drawings, including some desired changes, between the initial discussion with Big H and the February 25, 2003 contract signing. R. 2797 at 68-69; R. 2799 at 43-44.

9. However, Dwayne Horsley testified that he had not seen the plans “before February 25, 2003,” when the parties signed construction contracts. R. 2801 at 92.

10. In the preliminary discussions, before the February 25 contract signing, Chuck and Beverly Hale asked Dwayne Horsley for an estimate of the cost of building the houses, so that they could evaluate the desirability and feasibility of the project and so that they could obtain financing. The Hales emphasized that he wanted the estimates to be accurate. R. 2799 at 44-45.

11. On February 25, 2003, Big H gave the Hales two sets of contracts for both the Lot 45 house and the Lot 46 house. The Hales first signed contract documents pricing the Lot 45 house at \$823,000 and the Lot 46 house at \$813,000. Later that day, Dwayne Horsley went back to the Hales and said that after having more closely reviewed the plans, Big H had to change the estimated costs in the documents. At that point, Big H indicated that the Lot 45 house would cost \$1,100,000 and the Lot 46 house would cost \$840,000. R. 2797 at 93-99; Exhs. P-5, 6, 7, 8.

12. The Hales contracted with the lot owner to purchase the building lots, 45 and 46, Triple Crown Estates, separately. Defendants/Appellees have never had any right, title or interest in either lot. Exh. P-4; R. 2797 at 55-56; R. 2803 at 181, 185-86.

13. Dwayne Horsley testified that the numbers in the contracts were made without having reviewed any plans; Big H did not do any research or obtain bids prior to making the estimates used in the contract documents. R. 2801 at 29, 31, 53, 57-58.

14. Dwayne Horsley admittedly fabricated construction estimates for a lender to reach a predetermined number. R. 2801 at 31, 36. However, Big H did not inform the Hales of that. R. 2801 at 35-37. They understood that the figures indicated in the contracts represented actual construction estimates. R. 2799 at 44-45; R. 2801 at 37.

15. Nevertheless, Big H's agent told the Hales that the prices are what it would cost to build their homes. R. 2797 at 57-58.

16. Approximately six weeks after the fixed price contracts were signed, Big H went back to the Hales and asked them to sign a contract addendum. R. 2797 at 101-106. This Addendum states, "1. Buyers are aware the Residential Constr. Contracts do not reflect the true purchase price of the homes being build on lots 45 & 46 Triple Crown Est. 2. Buyers are aware that homes are being built on a cost plus 10% basis." Exh. P-10.

17. Dwayne Horsley persuaded the Hales to accept a cost plus method because he represented that by building the two houses on adjacent lots at the same time, they would save twenty percent on the total cost – both the labor and the supplies – as compared to building the two houses separately. R. 2797 at 102-03, 106; R. 2799 at 122-23, R. 2801 at 43.

18. Prior to the execution of the contract, Big H told the Hales that it would provide receipts and documentation of all of the expenses. The Hales understood that through that method, Big H's fee would be calculated. R. 2799 at 49-50.

19. However, Big H did not provide the requested receipts. *Id.* Instead, Defendants failed, despite requests from Hales, to furnish a proper accounting of actual

costs incurred in construction of the homes, either during or since completion of the Project. *Id.*; R. 2799 at 55, 88-89.

20. The contracts required written change orders. Though numerous changes were made, Big H did not present a single change order to the Hales. Exhs. P-6, P-8; R. 2801 at 22, 24.

21. Big H did not put any subcontracts out to bid, but dealt with suppliers and laborers known to it, including friends and family. R. 2801 at 38, 40-41. Big H performed (and billed separately) all framing on the Project. R. 2801 at 42-43.

22. As construction progressed, Defendants sought and received progress payments and draws directly from the Hales lenders. In addition, Defendants sometimes sought payments from the Hales directly, and at other times, the Hales paid vendors directly. R. 2799 at 83-84; R. 2801 at 197-98.

23. Big H was building houses for Dwayne Horsley's father, uncle and brother at the same time that the Hale houses were under construction. R. 2801 at 12-13, 37-38. The Horsleys have admitted that some of the material intended for the Hales houses ended up in James' house. R. 2801 at 51-52. Charles Hale Junior testified that it appeared this was a frequent occurrence: excess materials were ordered without explanation, materials were delivered to the site and then "disappeared" and materials were delivered to the site that were not for the Hales' houses. R. 2800 at 5-8. He also described an example where he had attempted to secure valuable materials, only to have Big H remove the padlock, and the materials were stolen with days. R. 2800 at 8-9.

24. Near the end of construction, a subcontractor advised Hales to tour James Horsley's home. After touring James' house, Chuck Hale testified that James' house had the same trim, crown moulding, base moulding, tile, paint, and glaze as the Hales' houses. R. 2797 at 173-74; R. 2979 at 84-85. Yet, at the time that James' house was under construction, he was living in the basement of the Hales' second house and claiming that Dwayne had not been paying him. R. 2799 at 85.

25. In fact, Dwayne Horsley testified that he built his father's house "for free." R. 2803 at 12-13.

26. Mr. Hale also counted the tile and concluded that he had paid for at least one pallet of tile that he did not receive. R. 2797 at 171.

27. At one point in September of 2004, with the costs having escaped the estimates and the construction still incomplete, the parties called a meeting. The Hales asked Dwayne Horsley how much more money was required to fully pay the subcontractors and complete the project. Dwayne Horsley calculated the remaining costs as \$276,000 and unequivocally assured the Hales that the money would only be used for their homes and that the construction would be completed for that sum. In reliance, in September 2004, Chuck Hale gave Big H a check for \$276,000. R. 2799 at 80-82; Exh. P 22.

28. Predictably, the \$276,000 did not cover the remaining costs. R. 2799 at 82-83.

29. Ultimately, the Hales paid over \$2,350,000 on the projects. R. 2803 at 18-19. All parties agree that the Hales did not receive a 20% cost savings. R. 2801 at 43, 44.

30. On top of that, the project was very late. In the February 25, 2003 Contract documents, Big H represented that construction would be complete by November 20, 2003. Exhs. P-6 at 6; P-8 at 6. It is undisputed that construction was not completed before November 2004. R. 2801 at 70.

31. Near the end of the construction, Mr. Hale gave Big H a punchlist of items to be completed. R. 2799 at 96-97; R. 2801 at 70-71; R. 2797 at 163 and Exh. P 27.

32. Whether there is warranty work to be completed is disputed. In support of the marshalling requirement: at one point in his testimony, Dwayne Horsley testified “to my knowledge” everything on it was completed. R. 2801 at 71. When asked to go through a list of warranty items, he testified that he was uncertain of at least one item and disputed at least two other items. R. 2801 at 71-72.

33. However, Charles Hale senior, Charles Hale Junior, Beverly Hale, and both experts testified that there were items that still needed to be fixed. R. 2800 at 23-24; R. 2803 at 115-116, 173-74, R. 2801 at 131-32, 175-181, R. 2799 at 96; R. 2797 at 163, 164. The trial court was presented with multiple pages of photographs and narrative from Hales detailing the repair work remaining after Defendants/Appellees walked off the job – Exh. P 26.

34. Plaintiffs' expert John Lipzinski testified that Big H failed to construct the homes in a good and workmanlike manner, with numerous items being completed improperly, or left uncompleted altogether. John Lipinski testified that the cost to remedy these items was \$27,200.38 for Lot 45, and \$45,894 for Lot 46. R. 2803 at 11-12.

35. At the closing, the parties had contemplated that Big H would present invoices and receipts for all of the costs of construction, and the Hales and Big H would then settle as to the ten percent owing to Big H. R. 2802 at 238-39; R.2799 at 95-96.

36. However, before that occurred, the Hales agreed to advance Big H some of the profits. The day after the Hales gave Big H the \$276,000 check, Dwayne Horsley requested and received an additional \$100,000 as an advance on Big H's profit. Exh. P-23, R. 2801 at 46-48; R. 2799 at 95-96.

37. Also, in November and December of 2004, the Hales gave James Horsley a check for \$30,000 with the notation that it be "builder's profit." Exh. P-24; R. 2802 at 238. The parties dispute the purpose of this check, and the evidence respecting that is marshaled fully in the argument section.

38. In addition, the Hales paid Big H an additional \$6,000 as builder's profit on the project. Exh. P-25; R. 2799 at 93-94.

39. Dwayne Horsley acknowledged that at least \$2,000 the \$6,000 payment went toward the builder's profit on the Lot 45 house. R. 2801 at 48.

40. Hales believed that Big H had been paid an amount equal to or greater than (1) all projected costs, plus 10% thereof, and (2) the reasonable cost of completion of the

homes, plus 10% thereof. This notwithstanding, Big H continued to demand more money for completion of the homes. R. 4, 8.

41. By the time Big H left the Project, Hales had made total net payments on the Project of \$2,375,507.99, for which they had never received an accounting. R. 2803 at 18-19.

42. On March 1, 2005, Hales received written notice that Big H had filed a Notice of Claim of Mechanic's Lien against Lot 45 only, claiming the right to additional payment of \$165,000. Dwayne Horsley admitted that he directed the filing of the lien. Exh. P-28; R. 2801 at 73-74.

43. Dwayne Horsley admitted that the amount did not represent the cost of labor or materials incorporated into the Project (all of which had been paid for, by his own admission), but rather "profit" for Big H. R. 2801 at 73-74.

44. Plaintiffs expert in construction cost accounting, John Lipzinski, reviewed all records furnished by Hales and defendants, and provided testimony and documents showing that Big H overcharged on the Project by \$116,994.77, taking into account (1) items in which the Big H used the Hales' loan funds to pay subcontractors and materialmen more than the invoiced amount; (2) items in which Big H paid less than the invoiced amount but charged the Hales for the invoiced amount; (4) items on which Big H was not entitled to recover a builder's profit, including the land; and (5) credit for total payments of \$2,375,507.99 against the adjusted cost of the work. R. 2803 at 2-19.

45. Mr. Lipzinski was the only witness to account to the trial court for all defensible job expenses, and all payments, on the Project as a whole. (Mr. Neilson, Defendants' expert acknowledged that he did not calculate the actual costs or the actual payments. R. 2803 at 124.) Mr. Lipzinski's analysis, which took into account all relevant factors, is summarized as follows:

**Hale vs Big H Construction
Cost of Work vs. Paid Summary
Schedule 1 (Revised Interim Trial)**

Adjusted Cost Of The Work			
Invoiced Amount	Sch 2		\$2,414,842.60
Less Unsupported Costs	Sch 3		(\$72,735.16)
Less Owner Credit for Under Paid Amounts	Sch 11		(\$126,793.43)
Subtotal			\$2,215,314.01
Less Rework & Adjustment (Estimate)	Lot 45	Sch 4	(\$27,200.38)
Less Rework & Adjustment (Estimate)	Lot 46	Sch 5	(\$45,894.49)
Less Crown Molding Adjustment	Lot 45	Sch 10	(\$1,496.24)
Net Cost of Homes		1	\$2,140,722.91
Less Non Fee Items		Sch 6	(\$159,341.00)
Allowable Fee Costs			\$1,981,381.91
Big H Fee 10%		2	\$198,138.19
Total Adjusted Cost		1+2	\$2,338,861.10
Actual Paid Costs			
Paid	Sch 9		\$2,292,000.44
Less Big H Amount Paid	Sch 8		(\$727,698.05)
Plus Big H Reimbursed Amount	Sch 9		\$675,205.60
Plus Big H Fees Paid	Sch 9		\$136,000.00
Total Adjusted Paid			\$2,375,507.99
Reimbursement Due			
Amount Due or (Overpaid)	Cost - Pd		(\$36,646.89)
Less Value Not Received (Big H Overpaid)	Sch 11		(\$80,347.88)
Total Due or (Overpaid)			(\$116,994.77)

R. 2803 at 2-19.

2. Marshaling of Evidence in Support of Trial Court Findings.

Plaintiffs/Appellants are aware of their obligation to marshal evidence supporting the trial court's rulings in any challenge to the sufficiency thereof – *see Golden Meadows Properties, LC v. Strand*, 2011 UT App 76, ¶ 13, -- P.3d --. Rather than set out a discrete section of the brief listing evidence supporting the trial court's challenged findings of fact, though, Plaintiffs/Appellants will marshal supporting evidence with respect to each challenged finding in the context of the fact and argument sections discussing the same as appropriate.

SUMMARY OF ARGUMENT

The parties entered into contracts for the construction of two houses on adjoining lots and later amended the contracts from a fixed fee to a cost-plus 10 percent basis.³ Ultimately, Big H filed a mechanic's lien against one of the houses, Lot 45, in the amount of \$165,000.⁴ The claimed amount included only the builder's profit portion.⁵

Plaintiffs Charles and Beverly Hale believed that they had paid in full or had already overpaid Big H; accordingly they brought suit with claims including (a) a declaratory judgment that the Hales had paid an amount equal to or greater than the legitimate and reasonable costs and the builder's fee, (b) breach of contract, and (c) abuse of lien right.⁶ Defendant Big H counterclaimed (a) for breach of contract, (b) to foreclose

³ R. 1724-25..

⁴ R. 31.

⁵ R. 2801 at 73-74.

⁶ R. 1-11.

the mechanic's lien, and (c) for unjust enrichment.⁷ Because Big H filed the lien, it bore the burden of proving all of the elements related to the validity of the lien. *Martindale v. Adams*, 777 P.2d 514, 516 (Utah Ct. App. 1989) (stating that "lien claimant has the burden of proving all elements necessary to establish entitlement to mechanic's lien").

At the same time, because of the nature of a cost-plus contract, the contractor may charge only reasonable costs. "An agreement to do work on a cost-plus basis does not mean that one has the right to expend any amount of money he or she may see fit upon the work, regardless of the propriety, necessity, or honesty of the expenditure, and then compel repayment by the other party." 17A Am. Jur. 2d Contracts, § 495. "In any cost-plus contract, there is an implicit understanding between the parties that the cost must be reasonable and proper." *Id*; see also *Forrest Const. Co., LLC v. Laughlin*, -- S.W.3d --, *8, 2009 WL 4723365 (Tenn. App.) (same); *Treen Const., Inc. v. Reasonover*, 30 So.3d 933, 936 (La. App. 2009) ("Under a cost plus contract, the contractor may charge only those costs that are shown to be reasonable and proper."). Big H presented invoices totaling \$2,740,649 for both houses.⁸ Accordingly, Big H bore the burden of proving that the reasonable cost of constructing the houses was \$2,740,649, and it was owed an additional \$165,000. Big H failed, in any reasonable manner, to meet that burden; in fact, the only reasonable evidence presented to the trial court established that Plaintiffs/Appellants overpaid by more than \$100,000.00.

⁷ R. 58-60.

⁸ R. 1731.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT BIG H MET ITS BURDEN ON THE LIEN AND CONTRACT CLAIMS BECAUSE THE TRIAL COURT RELIED ON ESTIMATES RATHER THAN COMPLETE ACCOUNTING EVIDENCE.

The trial court ruled that Big H met its burden of proof on to foreclose its mechanics' lien and on its breach of contract claim.⁹ Those claims required Big H to prove that the reasonable cost of constructing the houses was \$2,740,649, and it was owed an additional \$165,000. The trial court erred as a matter of law because it relied on testimony based on estimates, rather than actual expenditures and payments.

In a cost-plus contract, the contractor can satisfy its burden of proof only with evidence of actual expenditures and payments; estimates and averages may not be used. "In a cost-plus contract, costs must be established by competent proof: The meaning of 'costs' is plain and definite in the sense that it denotes *actual* as opposed to average costs. The party performing under a cost-plus contract must keep [adequate] record[s] Approximations and averages are insufficient." *Freeman & Co. v. Bolt*, 968 P.2d 247, 254 (Idaho App. 1998) (emphasis in original); *see also Arc Elec. Co., Inc. v. Esslinger-Lefler, Inc.*, 591 P.2d 989, 992 (Ariz. App. 1979) (same). "Presentation of invoices and statements of account, accompanied by proof of payment, is the proper method of proving the expenses or costs." 17A Am. Jur. 2d, Contracts § 495. "In a cost plus contract, the owner agrees to reimburse the contractor for the costs of material and labor and to pay a percentage of those costs as his profit. ... When the owner denies his

⁹ R. 1731-32; R. 2120, 2133-34.

indebtedness to the contractor, the contractor has the burden to itemize and prove his costs.” *Treen Const., Inc. v. Reasonover*, 30 So.3d 933, 936 (La. App. 2009). In a cost-plus contract, “[t]he contractor is under a duty of itemizing each and every expenditure made by him on the job....” *Forrest Const. Co., LLC v. Laughlin*, -- S.W.3d --, *8, 2009 WL 4723365 (Tenn. App.). “Actual cost must be based on labor and materials that become a part of the completed work. Actual cost cannot be computed upon the average or proportional part of the cost but must be the exact sum expended.” *Nolop v. Spettel*, 64 N.W.2d 859, 863-864 (Wis. 1954). The “‘cost’ to [the contractor] of the materials and labor should control rather than ‘reasonable value.’” *Union Bldg. Corp. v. J&J Bldg. & Maintenance Contractors, Inc.*, 578 S.W.2d 519, 522 (Tex. Civ. App. 1979). In short, the contractor’s burden of proof in a cost-plus contract may be met only with evidence of actual expenditures and payments, and the trial court erred in relying on Big H’s offered evidence which failed to account for actual costs and payments made¹⁰.

In this case, Defendants and the court relied on the testimony of Defendants’ expert, Robert Neilson, to show reasonableness.¹¹ Defendants’ expert based his testimony that the costs were reasonable on estimates, rather than an accounting of the

¹⁰ The trial court relied on Defendants’ Exhs. RR and SS to calculate its judgment. Neither exhibit documents payments – see Point III, below.

¹¹ Specifically, the trial court’s Minute Entry ruling that the “the defendants have met their burden of proof in demonstrating that all costs they incurred in the construction of the home pursuant to the parties’ contract were reasonable,” R. 1731, and its ruling in the Findings of Fact that “the hard Costs for the Lot 45 home were reasonably incurred” are in error. R. 2120.

costs and payments.¹² Mr. Neilson did not calculate the total amount of the costs and compare that to the total amount of the payments; instead, he applied two methods, both of which estimated the costs but did not consider the payments.¹³ Under his “change order valuation method,” Mr. Neilson added the original fixed price contract amount to estimates as if the parties had created change orders.¹⁴ To arrive at his estimates, Mr. Neilson relied on the actual invoices for Lot 45, a national cost estimating database called RS Means, and a database of costs that he maintains personally.¹⁵ He then compared that total to the total of the invoices that were provided on the Lot 45 house and determined that the Hales received more value than what they paid.¹⁶ With his “square footage valuation method,” Mr. Neilson calculated the per square foot price from the original fixed price contract, then multiplied the per foot price to the added footage.¹⁷ He added those figures and also added in fifteen percent premium to account for the better quality amenities in the Lot 45 house.¹⁸ Again, this estimate was higher than the total of the invoices for Lot 45.¹⁹

¹² R. 1731.

¹³ R. 2803 at 92-96, 102-104; R. 1322 referencing unnumbered binder containing Def. Exh. HHH at tab H.

¹⁴ R. 2803 at 92-96, 102-104; R. 1322 referencing unnumbered binder containing Def. Exh. HHH at tab H, fifth to eighth page.

¹⁵ R. 2803 at 94-95.

¹⁶ R. 2803 at 106-107; R. 1322 referencing unnumbered binder containing Def. Exh. HHH at tab H, fourth, fifth pages.

¹⁷ R. 2803 at 107-R. 1322 referencing unnumbered binder containing Def. Exh. HHH at tab H, fourth page.

¹⁸ *Id.* at second through fourth pages.

¹⁹ R. 1322 referencing unnumbered binder containing Def. Exh. HHH at tab H at fourth page.

Mr. Neilson acknowledged that the original contract price “was a budget. I knew it wasn’t a fixed cost for the home.”²⁰ Mr. Neilson did not consider the totals paid by the Hales.²¹ Mr. Neilson did not attempt to determine how much was owed and to whom by offsetting the actual costs against the actual payments.²² The trial court erred as a matter of law in accepting Mr. Neilson’s estimations as proof that Big H’s costs in the cost-plus contract were reasonable. Big H was only permitted to demonstrate that through an actual accounting.²³ This it failed to do.

²⁰ R. 2803 at 114.

²¹ R. 2803 at 124.

²² R. 2803 at 124.

²³ This issue was preserved. Plaintiffs did not object to the admission of Mr. Nielson’s testimony because it was relevant to and admissible in relationship to Defendants’ unjust enrichment claim and to Plaintiffs’ claim for declaratory judgment. Rather, Plaintiffs preserved this issue by (a) filing a motion in limine arguing that “costs” must be proved in a cost-plus contract and proof of a “cost” must be accompanied by proof of payment, R. 998-1000 and (b) filing a motion in limine arguing that Defendants were required to prove reasonableness, R. 1001-1005. In addition, at trial, Plaintiffs’ counsel argued that Defendants were required to prove that all costs were reasonable and that the proof had to be made through an itemization of the expenditures. R. 2797 at 9. In response, the court questioned the allocation of the burdens of proof. R. 2797 at 10. Plaintiffs’ counsel reiterated the argument that Defendants had to prove the validity of the monies that they had been paid as well the additional money claimed in the lien. R. 2797 at 10-12. Defendants’ counsel appears to have conceded these points, and the court appeared to accept them as well. R. 2797 at 12-13. Plaintiffs’ counsel again reiterated the argument that is Defendant was required to show proof of the payments. R. 2797 at 13-14. And, the Court accepted that assertion. R. 2797 at 14. However, in the Minute Entry dated Feb. 8, 2010 and the Findings of Fact and Conclusions of Law, it became clear that the trial court had not considered the payments and had relied on Mr. Neilson’s testimony, which presented essentially equitable calculations of reasonableness rather than an accounting, in its conclusion that Defendants had met their burden on their legal claims, which was admissible as to the equitable claims permitted Defendants to establish its claim through estimations rather than an accounting of the costs and payments. R. 1731-32 and R. 2120. Plaintiffs objected to the proposed findings to the extent that they relied on equitable theories and an appraisal, and Plaintiffs again set out their arguments that

II. THE TRIAL COURT ERRED IN ITS CONCLUSIONS BECAUSE IT PERMITTED IMPROPER AND UNREASONABLE COSTS.²⁴

In the Minute Entry Dated February 8, 2010, the trial court considered the invoices and payments for both houses and ruled that Defendants were entitled to \$174,000 for the builder's profit on Lot 45;²⁵ the Findings of Fact and Conclusions of Law, which were prepared by Defendants' counsel, consider only Lot 45 to rule that Defendants were entitled to \$172,100 in additional builder's profit.²⁶ In both cases, the trial court's methods of calculation err because it permitted Big H to recover profit on improper items and to recover unreasonable costs.

A. The trial court erred by awarding Big H a ten percent commission on the land.

Big H filed a mechanic's lien under the Mechanic's Lien Act, Utah Code Ann. § 38-1-1, *et seq.*, and sought to foreclose on the lien. Dwayne Horsley testified that the amount of the lien was exclusively for builder's profit; it did not include any of the labor or materials that went into the project.²⁷ Big H's claimed builder's profit included a ten percent commission on the cost of the lots.²⁸

Defendants had the burden of proving the reasonableness of all expenses by accounting and were required to show payments. R. 1877-79, 1880, 1881, 1750, 1751

²⁴ The legal meaning of the term "cost" is a question of law for the court. *See Freeman & Co. v. Bolt*, 968 P.2d 247, 251 (Idaho App. 1998) (ruling the construction of term "cost" in cost-plus contract is a question of law); *see also Dale K. Barker Co., PC v. John K. Bushnell*, 2010 UT App 189, ¶ 6, 237 P.3d 903.

²⁵ R. 1732.

²⁶ R. 2119; Another portion of the Findings of Fact and Conclusions of Law, without explanation, states that Big H was entitled to a fee of \$162,875. R. 2118.

²⁷ R. 2801 at 73-74.

²⁸ R. 2801 at 9-10; R. 2119.

Through the Findings of Fact and Conclusions of Law, which were prepared by Defendants' counsel, the trial court ruled that the profit on the land was not a commission on the "sale," but rather "Big H is simply claiming that the price of the land, i.e. its cost – once it has been acquired – is a "Cost" on which its agreed-upon fee is to be paid."²⁹ The trial court erred as a matter of law in permitting Big H to recover the ten percent builder's profit on the price of the two lots.³⁰ The recovery of a commission on the sale of real estate³¹ is barred by the Statute of Frauds and the Utah Real Estate Licensing and Practices Act,³² which permits only licensed realtors and brokers to receive commissions for the sale of land. In the alternative, if the fee was not based on the services provided in the acquisition of the lot, it is not recoverable because the Mechanics Lien Act³³ permits recovery for "service rendered, labor performed, or materials or equipment furnished or rented," and land cannot be considered "materials or equipment."

1. The Statute of Frauds bars the commission because there is no agreement supporting it.

The Utah Statute of Frauds bars Big H from taking a commission on the lots because the parties did not have a written agreement permitting it. The Statute of Frauds requires that "every agreement authorizing or employing an agent or broker to purchase

²⁹ *Id.* n. 12.

³⁰ See R. 2119.

³¹ The trial court found: "the Lots were reserved, negotiated and contracted for solely through" Big H and based on the testimony of Mr. Lipzinski, "contractor involvement of this type is an important factor in determining whether the price of the land is to be included in the costs." R. 2110.

³² Utah Code Ann. § 61-2-1, *et seq.* (2003).

³³ Utah Code Ann. § 38-1-1, *et seq.*

or sell real estate for compensation” be in writing “signed by the party to be charged with the agreement.” Utah Code Ann. § 25-5-4(5) (2003).³⁴ The Statute of Frauds also provides “No estate or interest in real property ..., nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same.” Utah Code Ann. § 25-5-1 (2003). The trial court made no finding that the Hales signed any agreement authorizing Big H, Dwayne Horsley, or anyone else to receive any commission on the purchase of the lots, and no evidence was admitted indicating that the Hales had signed such an agreement.³⁵ Yet the trial court’s judgment included the cost of the land in calculating the builder’s profit.³⁶ The trial court erred in permitting Big H to recover a profit on the cost of the land, where there was no written agreement authorizing such a profit or commission.

2. Because Appellees are not licensed realtors, they are not entitled to receive a commission on the sale of land.

The inclusion of the cost of the lots is also improper as a matter of law because, under the Utah Real Estate Licensing and Practices Act,³⁷ only licensed agents and brokers may take commissions on the sale of real estate. “No person may bring or

³⁴ The Statute of Frauds was amended in 2004, but it did not change the substance of this subsection.

³⁵ R. 1722-33; R. 2102-39.

³⁶ Whether that cost is proper is pivotal because if without including it, the lien was overstated and therefore unenforceable.

³⁷ The Utah Real Estate Licensing and Practices Act was amended in 2010; the version in effect between 2003 and 2005 is referenced here.

maintain an action in any court of this state for the recovery of a commission, fee or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service.” Utah Code Ann. § 61-2-18 (2003). Section 61-2-4 insists that “one act, for valuable consideration, of buying, selling, leasing, managing, or exchanging real estate for another, ... requires the person performing ... the act to be licensed as a professional real estate broker, an associate real estate broker, or a real estate sales agent as set forth in this chapter.” Because there is no finding and no evidence that Big H or Dwayne Horsley were licensed real estate agents or brokers, neither is entitled to recover a commission on the cost of the lots.

3. The Mechanic’s Lien Act does not permit taking a commission on the sale of the land by its plain language.

By its plain language, the Mechanic’s Lien Act, Utah Code Ann. § 38-1-1, *et seq.*, (“the Act”) does not permit a contractor cannot use the Act to enforce a claim for such a commission. Utah Code section 38-1-3 provides that a contractor who “rendered service, performed labor, or furnished or rented materials or equipment” shall have a lien “for the value of the service rendered, labor performed, or materials or equipment furnished or rented.” Utah Code Ann. § 38-1-3. In this case, it is undisputed that Big H performed a service for the Hales, i.e. building houses, and in the course of that provided materials. However, the land cannot be considered “material or equipment” under the Act because land is not a material or equipment “used in the construction, alteration, or improvement of any building or structure or improvement to any premises.” *Id.* See *King Bros., Inc. v.*

Utah Dry Kiln Co., 374 P.2d 254, 256 (Utah 1962) (distinguishing realty from materials that become a fixture appurtenant to realty). In addition, insofar as it is undisputed that the Hales did not purchase the land from Big H,³⁸ Big H did not “furnish” the land. Accordingly, Big H claim a commission on the sale of the land through the Act, and as a matter of law, the trial court erred in permitting Big H to recover the commission.

B. The trial court erred by permitting Big H to recover unreasonable costs.

The trial court’s method of calculating the “costs” was also erroneous as a matter of law because it credited Big H with amounts that are unreasonable as a matter of law (whether costs are reasonable is a question of law – *Dale v. Barker Co.*, 2010 UT App. 1891 ¶ 6; *Freeman & Co*, 968 P. 2d at 251). Specifically, the errors include: (a) duplicated invoices and inaccurate recordings; (b) the full value of the invoices, even though the payment records showed that Big H paid less than the full amount of the invoices (“the Underpayments”); and (c) credits for the amount of payments in instances where the invoiced amount was less than the payment (“the Overpayments”). As a lien claimant, Big H is bears the burden of supporting all of its costs. If the full value of an invoice was not made, it cannot be considered a “cost,” and if Big H inexplicably overpaid in invoice, it cannot be a “reasonable” cost as a matter of law.

³⁸ R. 2109-10.

1. The trial court improperly credited Big H twice for duplicate and mistaken invoices.

The trial court's finding that there were no inaccuracies in Big H's final accounting is clearly erroneous. The trial court found, "[T]he Hales' expert, Mr. Lipzinski, did not testify that there were any inaccuracies in Big H's final accounting (Exhs. RR and SS)." R. 2118-19. With respect to the marshalling requirement, it is true that Mr. Lipzinski never testified that there were inaccuracies in RR or SS. However, Mr. Lipzinski testified that there were errors in an identical document. Defendants' Exhibit RR and Plaintiffs' Exhibit 33 are identical.³⁹ Both are Big H's final accounting for Lot 45.⁴⁰ And, Mr. Lipzinski did testify that there are inaccuracies in Exhibits 33 and 34. Mr. Lipzinski was asked, "Last foundational question on Exhibits 33 and 34 – did you discover errors in those documents. Just yes or no." R. 2801 at 158. He answered, "Yes, sir. I did." *Id.* at 159.

In addition, the existence of duplicates and errors is shown in the documents themselves. Exhibit D-RR Item 38 Invoice 4536⁴¹ and Exhibit SS Item 37 Invoice 4536⁴² for CJ Heating are duplicates, in the amount of \$17,985.⁴³ In addition, Exhibit SS Item

³⁹ Compare D-RR and P-33.

⁴⁰ See R. 2119 (finding that RR and SS are Big H's final accounting) and R. 2801 at 80-81.

⁴¹ Unnumbered binder D-RR at Tab 38 third page.

⁴² Unnumbered binder D-SS at Tab 37 first page.

⁴³ These invoices are duplicates with one exception. In the box "Project" box, "Triple Crown 45" is typed on Exhibit RR; however, on Exhibit SS "Triple Crown" is typed and it appears that "46" was written in hand over a typed number. See Unnumbered binder D-RR at Tab 38 third page; Unnumbered binder D-SS at Tab 37 first page.

24 lists Invoice 4601 from Stroud at \$120,000, but the invoice is only \$60,000.⁴⁴ And, Exhibit SS Item 45 Invoice 1011 is listed twice from RT Custom Cabinets for \$21,000.⁴⁵ Accordingly the trial court's implied finding that there were not errors or duplicates in Exhibits RR and SS, and its reliance on those exhibits, is clearly erroneous.

2. The trial court erred in counting Overpayments and Underpayments as Costs because they are not reasonable as a matter of law.

The Findings of Fact and Conclusions of Law concluded, as a matter of law, that the "Overpayments" and "Underpayments" should be "netted-out" because it "result[s] in no damage to the owner."⁴⁶ The court gave the example that a \$5,000 overpayment should be deducted by a \$5000 underpayment, whereas Plaintiff's expert calculated that both should be credited to the owner.⁴⁷ The trial court characterized the calculation of giving the Hales credit for both the Underpayments and the Overpayments as a "double dip."⁴⁸ However, the Overpayments and Underpayments are properly credited to the owner because the costs cannot be considered "reasonable" if they are more than the subcontractor or supplier charged or less than the contractor paid.

The full invoiced amount cannot be considered a reasonable cost when a contractor pays less than an invoiced amount. In a cost plus contract, the contractor "must itemize each expenditure made by him." *Burdette v. Durshell*, 837 So.2d 54 (La.

⁴⁴ Unnumbered binder D-SS at Tab 24 first page.

⁴⁵ Unnumbered binder D-SS at spreadsheet before tab 1 fifth page.

⁴⁶ R. 2126-28.

⁴⁷ R. 2128.

⁴⁸ R. 2126-27.

App. 2002). “[A] condition is implicit in cost-plus contracts that the subcontractor owes the contractor a duty to make every reasonable effort to minimize costs and thus may recover only for such material and labor which it is necessary to use to complete the job, absent of course, a contractual expression to the contrary.” *Metropolitan Elec. Co., Inc. v. Mel-Jac Const. Co.*, 576 P.2d 323, 325 (Okla. App. 1978). “An agreement to do work on a cost-plus basis does not mean that one has the right to expend any amount of money he or she may see fit upon the work, regardless of the propriety, necessity or honesty of the expenditure, and then compel repayment by the other party, who had relied on his or her integrity, ability and industry.” 17A Am. Jur. 2d Contracts § 495; *see also Burdette*, 837 So.2d at 66 (rejecting a claimed charge “since it was not proven to have been paid.”). Accordingly, only the paid costs are proper as a matter of law – except where a contractor inexplicably overpays an invoice – then the invoiced amount is the reasonable cost.

The Hales presented undisputed evidence that certain invoices were underpaid or overpaid.⁴⁹ Yet, the court relied on Exhibits RR and SS without deducting the unreasonable amounts.⁵⁰ Accordingly, the trial court erred as a matter of law.

3. The trial court improperly disregarded warranty repair work.

In its Minute Entry ruling (Appendix at Attachment 1), the trial court concluded that, because Plaintiff/Appellant Charles F. Hale testified that he did not conduct a walk-through of the homes prior to Defendants’/Appellees’ abandonment of the project (R. 1728-29), and because Defendant/Appellee Horsley testified that he completed all

⁴⁹ See R. 2126-28.

⁵⁰ R. 1731-32.

items set out on Exh. P 27 (R. 2801 at 70-72), Plaintiffs/Appellants were not entitled to claim against Defendant/Appellee Big H for breach of the acknowledged warranty of workmanlike construction applicable to the project, both under the express terms of the parties' agreements (Plaintiffs' Exhibits P-6, P-8 at § 3), and as a matter of recognized industry standard (R. 2801 pp. 25-26). In its Findings of Fact, the trial court added that Plaintiffs/Appellants failed to make a warranty claim on Lot 46 within one year of issuance of the certificate of occupancy thereon, and were thus time-barred on that claim (Appendix at Attachment 2, pp.25, R. 2130).⁵¹

In reference to the marshaling requirement, Dwayne Horsley testified that he completed all of the claimed warranty work, R. 2801 at 71, and Chuck Hale testified that he did not comply with the contractual requirement of establishing an escrow account. R. 2799 at 14. On the other hand, Mr. Horsley's testimony must be read in full: he equivocated in some parts of his testimony on the subject. For example, at one point, he testified that he completed the items "to my knowledge." R. 2801 at 71. At another point, when asked to go through a list of warranty items, he testified that he was uncertain of at least one item and disputed at least two other items. R. 2801 at 71-72. On the other hand, Charles Hale senior, Charles Hale Junior, Beverly Hale, and both experts testified that there were items that still needed to be fixed. R. 2800 at 23-24; R. 2803 at 115-116,

⁵¹ In recognition of the marshaling requirement, Dwayne Horsley testified that he completed all of the claimed warranty work, R. 2801 at 71; the trial court found "Chuck Hale testified ???; D.

173-74, R. 2801 at 131-32, 175-181, R. 2799 at 96; R. 2797 at 163, 164. The Court was also given photographic evidence of uncompleted repairs – Exh. P 26.

By agreement of all concerned, the houses were constructed as part of a single, unified project, which Defendants/Appellees did not abandon until December of 2004, only four months before this action was commenced. Yet, the Judgment failed to consider the cost of those repairs in its calculation. To that extent, it is not based on sufficient evidence.

The Minute Entry and Findings (Appendix at Attachments 1 and 2) seems to sidestep this with the implication that, by their inaction, Plaintiffs waived their claim for warranty repairs. That is an error of law. Waiver requires a knowing and voluntary relinquishment. *Doctors' Co v. Drezga*, 2009 UT 60, ¶ 15, 218 P.3d 598 (citing *Continental Ins. Co. v. Kingston*, 2005 UT App 233, ¶ 9, 114 P.3d 1158). Mrs. Hale testified that she understood that the builders' profit would be payable after the Hales had received a complete accounting for the project. R. 2799 at 95-96. While Plaintiffs/Appellants were given a packet of receipts just before Big H filed its lien, it is undisputed that no accounting was given to them until the litigation was well underway. As stated by Mr. Hale, "We haven't got the project finished by our view." R. 2799 at 15. By his own admission, Mr. Horsley walked off the job of his own volition, before Plaintiffs deemed it completed, thus affording no opportunity for the contractual "walk through." R. 2801 at 70. Because the Hales did not believe that the project had closed,

they did not knowingly and voluntarily waive their right to have the warranty work completed.

No evidence whatever exists to challenge John Lipzinski's figures on the cost of repairs. Rather, the trial court dismissed his figures as "estimates" (Findings of Fact, Appendix at Attachment 2, at p. 24). Yet where a breach is found, and no contrary evidence is presented, damages are to be quantified in whatever method is reasonable; mathematical precision is not required. *See Security Development Co. v. Fedco, Inc.*, 23 Utah 2d 306, 462 P.2d 706 (1969).

III. THE TRIAL COURT ERRED IN FAILING TO ACCOUNT FOR ACTUAL PAYMENTS BY PLAINTIFFS/APPELLANTS.

The trial court concluded that Plaintiffs/Appellants Charles and Beverly Hale had underpaid Defendant/Appellee Big H Construction for the construction of the homes on Lot 45 and 46, Triple Crown Estates by \$174,000. R. 1732. In reaching its conclusion, the court accepted Mr. Neilson's estimate-based testimony that the costs were reasonable and then acknowledged by ignored his testimony that in his opinion the builder's fee for Lot 45 should be "in the sum of \$149,425.00." R. 1731 To calculate the judgment, the court simply added the sum of the invoices from Defendants' binder for both lots, multiplied by the ten percent builder's profit, and then deducted the \$100,000 payment for builder's profit that had been paid. R. 1731-32.

By adopting the Findings of Fact and Conclusions of Law prepared by Defendants' counsel, the court then employed a modified methodology. There, the court considered only the invoices from Defendants' binder for Lot 45 and multiplied by ten

percent. R. 2119. Another portion of the Findings of Fact and Conclusions of Law, without explanation, states that Big H was entitled to a fee of \$162,875. R. 2118. As noted under Point I, above, the proper measure of amounts due under a cost-plus contract entails a comparison of actual, reasonable and recoverable costs (*see* Points I and II) against actual payments. The trial court's analysis as set out above was totally lacking in this last respect. In its ruling, and again in its findings of fact and conclusions of law, the trial court simply accepted invoice totals set out in Defendant's/Appellee's Exhibits RR and SS at face value (*see* Point II above). Regarding the marshaling requirement, the trial court accepted Defendant/Appellee Dwayne Horsley's testimony that he had not received a separate payment which he treated as "builder's profit" on Lot 45 (R. 1731-32, Appendix at Attachment 1, R. 2120-22, Appendix at Attachment 2), and Exhibits RR and SS in some places state payments. As noted in Mr. Lipzinski's analysis, though, Defendants/Appellees failed frequently to document payments in any way.

Dollars are dollars – fungible legal tender for payment under a cost-plus contract, both to reimburse the builder for actual and reasonable costs, and to pay the 10% "builder's profit." In order to determine whether Defendant/Appellee Big H had been paid in full, therefore, the court needed to do more than simply accept Mr. Horsley's unsupported, conclusory testimony that he had not received funds which he deemed "builder's profit" on Lot 45. (Defendant/Appellee Big H, in fact, submitted numerous accountings during the course of litigation, received into evidence as Exhs. 31, 32, 35, 36 and RR and SS. The Court need only compare the wildly inconsistent figures in these

accounting efforts to see the inadvisability of relying on Mr. Horsley's accounting efforts at all.) Rather, the court needed to consult a full job accounting to determine the match-up of allowable costs to total payments, to determine whether Defendant/Appellee Big H had received enough money to cover both costs and builder's profit. *See* 17A Am. Jur. 2d Contracts, § 495.

The only witness to appear at trial who undertook a comprehensive analysis of actual costs versus actual payments was Plaintiffs'/Appellants' expert, Mr. John L. Lipzinski. Only Mr. Lipzinski undertook a global and comprehensive review of the total accounting on the project (including both Lots 45 and 46), reviewed all invoices (eliminating duplicates) and matching allowable charges against *total payments*.⁵² Mr. Lipzinski started with the invoiced amount on both projects, deducted cost claims unsupported by evidence presented by Defendants, credited Hales for underpaid amounts, deducted un-rebutted cost figures necessary to repair substandard workmanship on both projects, and arrived at a net cost of both homes. From this cost he deducted non-fee items to arrive at allowable fee costs. To these costs were added the contractor's ten percent builder's profit. These figures, in turn, were combined to yield the total adjusted "costs" on both projects, which was then compared to actual payments by Hales against the project. The remaining balance reflected significant overpayment by Hales on the project as a whole -- *see* Statement of Facts at p. 17, above.

⁵² Mr. Neilson testified that he did not consider undertake to account for the Lot 46 construction and did not add the costs and the payments. R. 2803 at 122-124

On cross-examination, Mr. Lipzinski was taken to task on his arithmetic. In numerous instances, opposing counsel did a creditable job of demonstrating to the court that Mr. Lipzinski had misread certain invoices, had failed to account for certain items, and had as a result overstated the amount of overpayment by Hales to Defendants. On re-direct, Mr. Lipzinski accounted for each and every one of the errors and discrepancies pointed out by Defendants' counsel (R. 2803 at 2-19). His corrected figures were then read into the record without objection. The resulting analysis, set out at p. 17 above, is the only comprehensive cost accounting for the entire project placed before the trial court.

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT THE HALES DID NOT SHOW THAT JAMES HORSLEY HAD ACTUAL OR APPARENT AUTHORITY TO ACCEPT A PAYMENT.

Near the end of the construction on Lot 45, in November 2004, the Hales wrote a check to James Horsley for \$30,000 and wrote "Builder's Profit" in the memo section of the check.⁵³ But, based on its factual findings, the court ruled that the \$30,000 payment to James Horsley should not be credited to the Hales as a payment to Big H.⁵⁴ The court trial court's legal conclusion is incorrect and its factual findings are clearly erroneous.

First, the trial court found,

James had no actual authority to receive payments on behalf of Big H, inasmuch as (i) he was not a shareholder, officer, director, or management employee of Big H, (ii) neither Big H nor [Dwayne] Horsley ever delegated such authority to James, and (iii) there is no evidence that James appears in any Big H records maintained by the Utah Division of Corporations.

⁵³ Unnumbered loose document labeled Exh. P-24.

⁵⁴ R. 2121, 2123.

R. 2121. This finding is clearly erroneous in respect to the “management employee” statement and insofar as it implies that James had no actual authority to receive 50% of the builder’s profit on the Hale project.⁵⁵ With respect to the “management employee” portion of the finding, and in support of the marshalling requirement, James testified that he was not ever an officer, director, or shareholder in Big H. R. 2802 at 242. And, Mr. Hale’s testimony could be read to indicate that he knew James was not receiving draws from Big H, and that James could not induce Dwayne to pay him. R. 2798 at 92-94. But, Dwayne Horsley testified that James was “foreman” on the Hales’ project. R. 2801 at 49. And, James testified that he did “the project management” on the Hales’ houses. R. 2802 at 231. Therefore, to the extent that “management employee” can mean something other than just corporate officers and directors, the finding is clearly erroneous.

In addition, the finding is clearly erroneous to the extent that it implies that James did not have actual authority to receive fifty percent of the builder’s fee. The evidence that supports the express language of this finding is: (a) Dwayne testified that James did not “accept payments of Big H from [the] Hales” and that Dwayne Horsley told the Hales

⁵⁵ Dwayne testified that James did not “accept payments of Big H from [the] Hales” and that Dwayne Horsley told the Hales that James could not accept payments. R. 2801 at 50. Specifically, when asked whether he told the Hales that James was not authorized, Dwayne testified, “I’m sure I did in some conversation.” *Id.* Later, when asked about a specific recollection of such a conversation, Dwayne testified, “I think... I guess, I figured they would have known, cause the contract was signed by me. So...” R. 2803 at 225-26.

that James could not accept payments, R. 2801 at 50; (b) when asked whether he told the Hales that James was not authorized, Dwayne testified, “I’m sure I did in some conversation,” *id.*; (c) Mr. Hale’s testimony could be read to indicate that he knew James was not receiving draws from Big H, and that James could not induce Dwayne to pay him, R. 2798 at 92-94; and Dwayne testified that James was an “employee.” R. 2801 at 14. But, both Dwayne and James testified that they had an agreement to split the profit on the Hale houses 50/50.⁵⁶

Accordingly, it is clearly erroneous to imply that James was not authorized to receive from the Hales a portion of the builder’s fee. “[P]rincipals are bound by the acts of their agents which fall within the apparent scope of the authority of the agents.” *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15 (Utah Ct. App. 1995). It was both within the apparent and actual scope of James’ authority to receive a builder’s profit payment from the Hales, and the trial court erred in failing to credit that payment to the Hales.

In addition, the trial court erred in ruling that James did not have apparent authority to receive the payment. This ruling errs as a matter of law, and some of the factual findings supporting it are clearly erroneous. In regard to the factual findings, for example, the trial court found, “there is no evidence that [Dwayne] Horsley ever stated, or otherwise led the Hales to believe, that James had authority to accept payments on

⁵⁶ R. 2801 at 14-15; R. 2802 at 231, 242.

behalf of Big H.” R. 2121.⁵⁷ However, that finding is directly contradicted by the documentary evidence and the parties’ testimony. Defendants’ Exhibit JJ⁵⁸ shows that the Hales gave James Horsley \$4,000 for a “Big H Const. expense reimbursement,” and there is no evidence that Big H rejected or disgorged that payment. In addition, Dwayne Horsley acknowledged that James Horsley had paid one of the subcontractors and was later reimbursed by the Hales.⁵⁹ James Horsley also testified that he “received a couple of checks payable to James Horsley” as reimbursements for the construction.⁶⁰ Mrs. Hale’s testimony accorded with Dwayne and James’s testimony regarding the instance

⁵⁷ Plaintiffs/Appellants again recognize the requirement that they must “marshal all evidence in support of the finding.” *Golden Meadows Properties, LC v. Strand*, 2011 UT App 76, ¶ 13, -- P.3d --. In this instance, there cannot be evidence to support a finding that there is “no evidence.” Nevertheless, Dwayne testified that James did not “accept payments of Big H from [the] Hales” and that Dwayne Horsley told the Hales that James could not accept payments. R. 2801 at 50. Specifically, when asked whether he told the Hales that James was not authorized, Dwayne testified, “I’m sure I did in some conversation.” *Id.* Dwayne Horsley testified that James was “foreman” on the Hales’ project. R. 2801 at 49. James testified that he was not ever an officer, director, or shareholder in Big H. R. 2802 at 242. Mr. Hale’s testimony could be read to indicate that he knew James was not receiving draws from Big H, and that James could not induce Dwayne to pay him. R. 2798 at 92-94. In addition, Mr. Hale testified that he knew that James and Dwayne were “estranged” at the time that he paid James the \$30,000. R. 2798 at 96.

⁵⁷ Dwayne testified that James was an “employee.” R. 2801 at 14. He later testified that James was not “an employee” but that he “was doing a service.” R. 2803 at 226. James testified that he did “the project management” on the Hales’ houses. R. 2802 at 231. James also testified that he was a “representative” of Big H and that the Hales “knew all along I wasn’t an employee other than I was doing a service for Big H,” that he “helped out” with the Hales houses, and that he served as a foreman “in a way.” R. 2802 at 231-232, 247-48. James also acknowledged that “much of the time” he was at the Hales’ houses “almost daily.” R. 2802 at 235-36

⁵⁸ Unnumbered white binder labeled “Orig. Trial Exhibits” at second tab J, second page.

⁵⁹ R. 2801 at 49-50.

⁶⁰ R. 2802 at 244.

reflected in Exhibit JJ,⁶¹ and she also testified that there were other occasions on which the Hales paid James for construction related expenses.⁶² In addition, both Dwayne and James testified that they had an agreement to split the profit on the Hale houses.⁶³ Accordingly, even considering the evidence that supports that finding, the finding must be viewed as clearly erroneous because on multiple occasions James did accept payments related to Big H's construction on the Hales' houses.

The trial court also found, "the Hales should reasonably have understood that James was merely a site superintendent on the project and not a Big H management member."⁶⁴ Though it is undisputed that James Horsley was never actually a shareholder, officer, or director in Big H, this finding is clearly erroneous in its use of the term "superintendent" and the implication that James was not a high-level agent for Big H.⁶⁵ In regard to the terminology, a search of every volume of the transcript indicates that the term "superintendent" was never spoken during the trial.⁶⁶ In regard to James's relative level of authority, it is undisputed that the Hales understood, at least to some extent, that James was in some way subordinate to Dwayne. However, it is also

⁶¹ R. 2799 at 32, 164; 176.

⁶² R. 2799 at 50, 76.

⁶³ R. 2801 at 14-15; R. 2802 at 231, 242.

⁶⁴ R. 2121.

⁶⁵ There is no evidence

⁶⁶ See R. 2797-2803. But, in regard to the marshalling requirement, Dwayne Horsley testified that James was "foreman" on the Hales' project. R. 2801 at 49. James testified that he was not ever an officer, director, or shareholder in Big H. R. 2802 at 242. Mr. Hale's testimony could be read to indicate that he knew James was not receiving draws from Big H, and that James could not induce Dwayne to pay him. R. 2798 at 92-94.

undisputed that James had a relationship to Big H,⁶⁷ and that James and Dwayne had intended to split the builder's profit between them.⁶⁸ Dwayne acknowledged that James was a "foreman," at least sometimes, "managing work" on the Hales' project.⁶⁹

In any event, the court's legal conclusion is in error because the factual findings do not properly consider the factors that would support a ruling of apparent authority. The trial court's other findings on this point were that: (1) the Hales were aware that there were "enormous tensions" between Dwayne and James and (2) that "the Hales well understood that James wanted the check to pursue a personal investment opportunity in a start-up mortgage company." R. 2121. These findings are insufficient to support the legal conclusion that the Hales did not show apparent authority.

"[T]o show apparent authority, the following must be established: (1) that the principal has manifested his or her consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third party knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his or her position and will be injured or will

⁶⁷ Dwayne testified that James was an "employee." R. 2801 at 14. James testified that he did "the project management" on the Hales' houses. R. 2802 at 231. James also testified that he was a "representative" of Big H and that the Hales "knew all along I wasn't an employee other than I was doing a service for Big H," that he "helped out" with the Hales houses, and that he served as a foreman "in a way." R. 2802 at 231-232, 247-48. James also acknowledged that "much of the time" he was at the Hales' houses "almost daily." R. 2802 at 235-36. See also discussion of the "management employee" below.

⁶⁸ R. 2801 at 14-15; R. 2802 at 231, 242.

⁶⁹ R. 2801 at 49.

suffer loss if the act done or transaction executed by the agent does not bind the principal.” *Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 209 (Utah 1993). The following facts are relevant to the first factor, James and Dwayne Horsley intended to split the profit on the Hales’ house 50/50;⁷⁰ James served as the “foreman;”⁷¹ and James received other payments related to the project.⁷² With respect to the second factor, the Hales understood that James was Dwayne’s “partner” in Big H and that he was a representative of it.⁷³ Indeed, James and Dwayne both testified that James was a representative of Big H.⁷⁴ In regard to the third factor, it is undisputed that the Hales paid James \$30,000,⁷⁵ he has not paid it back,⁷⁶ and the trial court did not credit them for that payment.⁷⁷ In short, receiving a portion of the builder’s profit was not just in James’s apparent authority but within his actual authority, and the trial court erred in concluding otherwise.

V. THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT/APPELLEES’ NOTICE OF MECHANIC’S LIEN VIOLATED UTAH CODE ANN. § 38-1-25, AND IN FAILING TO AWARD PLAINTIFFS/APPELLANTS A SUM EQUAL TO TWICE THE AMOUNT OF THE DIFFERENCE BETWEEN THE FACE AMOUNT OF THE LIEN AND THE AMOUNT (IF ANY) ACTUALLY OWING TO DEFENDANT/APPELLEE BIG H.

Given that Hales actually overpaid Defendant/Appellee Big H Construction on the project at issue in this matter, it is axiomatic that the lien filed by Defendants on

⁷⁰ R. 2801 at 14-15; R. 2802 at 231, 242.

⁷¹ R. 2801 at 49.

⁷² R. 2801 at 49-50; Exh. JJ; R. 2802 at 244.

⁷³ R. 2799 at 176-77; R. 2798 at 97.

⁷⁴ R. 2801 at 14; R. 2802 at 231-232, 247-48.

⁷⁵ Exh. P-24.

⁷⁶ R. 2802 at 241.

⁷⁷ R. 2121.

February 22, 2005 (Exh. P-28), asserting a right to an addition payment in the amount of \$165,000, was high by \$165,000. Even if a proper accounting yields a lesser overpayment (or, at most, a lesser amount owing to Big H), Defendants'/Appellees' conduct implicates a provision of Utah's mechanic's lien law.

A. Hales are Entitled to Recovery of Twice the Face Amount of the Lien, or Twice the Amount by which the Lien Amount Exceeds the Actual Obligation, Under Utah Code Ann. § 38-1-25.

Utah Code Ann. § 38-1-25 provides in pertinent part as follows:

Any person entitled to record or file a lien under § 38-1-3 is guilty of a Class B misdemeanor who intentionally causes a claim of lien against any property containing a greater demand than the sum due to be recorded or filed:

- (a) with the intent to cloud the title;
- (b) to extract from the owner or person liable by means of the excessive claim of lien more than is due; or
- (c) to procure any unjustified advantage or benefit.

(2) In addition to any criminal penalties under subsection (1), a person who violates subsection (1) is liable to the owner of the property or an original contractor or subcontractor who is affected by the lien for the greater of:

- (a) twice the amount by which the abuse of lien exceeds the amount actually due; or
- (b) the actual damages incurred by the owner of the property.

Evidence adduced at trial established the following facts as undisputed:

- that the lien (Exh. P-28) was recorded on or about the date it bears;

- that the lien was recorded at the behest of Defendant Dwayne Horsley, R. 2801 at 73;
- that Mr. Horsley was acting on behalf of Defendant Big H Construction, Inc. at the time, R. 2801 at 5;
- that Mr. Horsley furnished the \$165,000 face amount included in the Notice of Claim of Lien, 2801 at 73;
- that, at the time the Notice and Claim of Lien was filed, Mr. Horsley had only the spreadsheets prepared during the course of construction upon which to rely in preparing the lien notice (Exhibits P-35 and P-36). P-35 reflected that \$1,136,317.08 had been paid on Lot 45. R. 2801 at 76; Exh. P-35. Mr. Horsley also testified that he relied on the fact that the Hales had given him an additional \$276,000 and the cost of the lot. R. 2801 at 111. (He also indicated that he had the initial invoice binders, P-31 and P-32, which reflect the amounts in P-35 and P-36). The amount reflected in P-35 plus the cost of the lot and the \$276,000 total only \$1,546,817; ten percent of which is less than the lien amount, even if the lot cost could be considered.⁷⁸ In short, Mr. Horsley caused to be prepared and filed on behalf of Big H Construction a Notice and Claim of Mechanic's Lien in the amount of \$165,000, with no backup information establishing, or even giving a reasonable forecast of, the face amount of the lien. In point of fact, it was demonstrated at trial that Big H had been overpaid on the project; and accordingly, the lien amount was excessive by its entire amount if not more. In authorizing the lien, therefore, Defendants

⁷⁸ The later accountings had not yet been prepared, and Mr. Horsley claimed not to be in possession of additional invoices which were being held by Hales at the time.

sought to cloud Hales' title to Lot 45 in order to exact from them an amount more than was due, and otherwise to procure an unjustified advantage or benefit – all with actual knowledge (or reckless disregard) of the fact that the claim was unjustified.

B. Hales are Entitled to Damages Equal to the Greater of (1) \$330,000, or (2) Actual Damages, Together With Costs and Attorney's Fees.

The statutory penalty for abuse of the mechanic's lien right is clear from the face of § 38-1-25: twice the amount by which the abusive lien exceeds the amount actually due, or the actual damages incurred by the owner of the property. As such, Plaintiffs/Appellants submit that they should be entitled to twice the face amount of the lien, or \$330,000, as the proper remedy under § 38-1-25.

Utah Code Ann. § 38-1-18 likewise establishes that the prevailing party in any claim asserted under Utah's mechanic's lien act is entitled to recovery of costs and attorney's fees.

C. Plaintiffs/Appellants are Entitled to Recovery from Both Defendants, Who are Jointly and Severally Liable for Abuse of the Lien Right.

As noted above, Plaintiffs' claim for wrongful lien filing is statutory, arising out of Utah Code Ann. § 38-1-25. As such, the form and wording of the statute, together with its punitive nature, must be considered in its applicability to Defendant/Appellee Horsley in his individual capacity.

First, § 38-1-25 imposes both criminal culpability and civil liability upon "any person entitled to record or file a lien under Section 38-1-3." The referenced section permits liens to be asserted by "contractors, subcontractors, and all persons performing

any services [on a construction project].” As a licensed contractor with the state, and as an individual performing framing work on the project personally, Defendant/Appellee Horsley falls squarely within the class of persons and entities contemplated by the Act.

Second and more fundamentally, though, the Act makes clear that the same person criminally liable under subsection (1) will be civilly liable under subsection (2).

Assuming that Big H’s lien is wrongful under subsection (1), then, who bears criminal responsibility? Utah law makes this very clear: the individual committing the crime is responsible, not just the corporation on behalf of which he/she acts:

“A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf.”

Utah Code Ann. § 76-2-205. If (as the evidence clearly established) Defendant/Appellee Horsley recorded a notice of mechanic’s lien against Plaintiffs/Appellants’ property with full knowledge, based on his own records maintained during the project, that Big H had in fact been overpaid for work done on the two homes at issue, it is Defendant Horsley – not just Big H Construction – who has committed the statutory misdemeanor provided by the Act. And if criminally responsible, by the express wording of the act, Defendant/Appellee Horsley bears civil liability under the corresponding section. This interpretation is in accord with general rules of tort law (more fully discussed below): By law, criminal culpability is preclusive of liability for the corresponding tortious act – *see Prosser on Torts* (5th ed.) at § 2, pp. 7-8.

Third, where any tortious action is committed by an agent of a corporation, the agent may not escape individual liability by claiming that he was acting on the corporation's behalf – *see Pentecost v. Harward*, 699 P.2d 696 (Utah 1985). The wrongful filing of a lien claim under Utah Code Ann. § 38-1-25 should be deemed a “statutory tort”, giving rise to independent tort liability – *see Culp Construction Company v. Buildmart Mall*, 795 P.2d 650 (Utah 1990) (“Statutory requirements that give rise to independent causes of action under various unfair practices acts may also give rise to independent tort actions” – 795 P.2d at 655).

CONCLUSION

In reaching its ruling, the trial court made numerous factual determinations which are not subject to appeal. These, however, did not go to the heart of the parties' dispute – the prejudicial errors of the trial court, in arriving at the figures forming the basis of its judgment, were basically those of mathematics and accounting. The lower court simply disregarded the analysis properly put before it, opting for an over-simplified approach to cost analysis which disregarded both governing law and undisputed testimony.

This matter should be remanded to the trial court for entry of judgment in favor of Plaintiffs/Appellants, and against Defendants/Appelles, for the full amount of overpayment under the parties' agreements, together with statutory damages under Utah's Mechanic's Lien Act, plus an award of costs and attorneys' fees incurred herein.

DATED this 5th day of May, 2011.

JONES WALDO HOLBROOK & McDONOUGH PC

By

Vincent C. Rampton

Kathleen E. McDonald

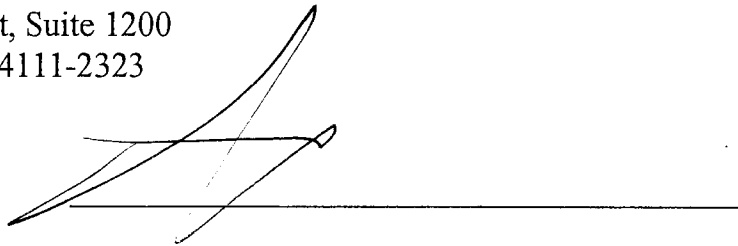
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
APPELLANTS' BRIEF was mailed via first class mail, postage prepaid, to the
following this 5th day of May, 2011:

John T. Anderson
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Salt Lake City, UT 84111-2323



Tab 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CHARLES F. HALE and BEVERLY I.	:	MINUTE ENTRY
HALE, husband and wife,	:	
	:	CASE NO. 050905279
Plaintiffs and Counterclaim	:	
Defendants,	:	
vs.	:	
BIG H CONSTRUCTION, INC., a Utah	:	
corporation, and T. DWAYNE HORSLEY,	:	
an individual,	:	
	:	
Defendants, Counterclaim	:	
Plaintiffs, and Third Party	:	
Plaintiffs,	:	
vs.	:	
CITIMORTGAGE, INC., a Delaware	:	
corporation, CITIBANK FEDERAL	:	
SAVINGS BANK, a federally chartered:	:	
savings bank, and JOHN DOES I-V,	:	
	:	
Third Party Defendants.	:	

This matter was tried before the Court on August 10, 12-14, and October 27-29, 2009. Plaintiffs were personally present and were represented by counsel, Vincent C. Rampton and Kathleen E. McDonald. Defendant T. Dwayne Horsley ("Horsley") was present personally and as representative of defendant Big H Construction, Inc. ("Big H"). Both defendants were represented by counsel John T. Anderson. Third party defendant CitiMortgage, Inc., was represented by counsel Bradley L. Tilt.

The Court having heard argument of counsel, testimony of witnesses, having received and reviewed exhibits, now enters the following rulings.

The Court finds in favor of defendants Big H and Horsley on all causes of action, and finds that plaintiffs and third party defendant have no causes of action. The Court incorporates the proposed Findings of Fact and Conclusions of Law previously submitted by defendants' counsel except as modified herein.

1 Personal Liability of T. Dwayne Horsley: Plaintiffs brought claims against Horsley, personally, based upon breach of contract and filing of the mechanic's lien. The contracts entered into between the parties for construction of the plaintiffs' two homes were entered into by the corporation, signed by a representative of the corporation. Horsley was the President and general building qualifier of Big H, who took certain actions during the construction of the homes on behalf of the corporation. There is no evidence that any actions he took were for his personal benefit during the construction phase.

Horsley testified that he filed a mechanic's lien, plaintiffs' Exhibit 28, on behalf of the corporation. He determined the amount of the mechanic's lien based upon spreadsheets that he had created as the project progressed. He testified that he relied on plaintiffs' Exhibits 31 and 32 to determine the amount. He also testified that he had no intent to cloud the title or acquire any leverage over the plaintiffs.

The mechanic's lien was filed February 22, 2005, on behalf of Big H. The lien identifies the lien claimant as the corporation.

The Court concludes, based upon all of the testimony and evidence that no evidence has been presented that Mr. Horsley entered into any contracts or took any action during the construction phase that would give rise to personal liability on his part. His actions were as representative of the corporation. The Court determines, therefore, that defendant T. Dwayne Horsley has no personal liability in any of the claims brought against him by plaintiffs.

2 Plaintiffs have failed to prove that defendants breached the contracts entered into for construction of the plaintiffs' two homes :

Plaintiffs claimed that Big H breached the parties' contract because no savings was realized in building the homes simultaneously. On February 25, 2003, plaintiffs contracted with defendant Big H for the construction of two homes in the Triple Crown Estates. The homes were referred to throughout the trial as Lot 45 and Lot 46. The first contracts had a fixed price for Lot 45 of \$823,000, and \$813,000 for Lot 46. Later the same day, both contracts were revised and prices adjusted upward to \$1.1 million for Lot 45 and \$840,000 for Lot 46. Both sets of contracts were executed by Dave Horsley, who was Dwayne Horsley's father, on behalf of Big H. The parties disputed whether Big H provided a bid for construction based upon small red-lined plans identified as plaintiffs'

Exhibit 1 for Lot 45. Charles Hale testified that there was a similar set of plans for Lot 46 which has subsequently been lost.

The Court finds that the plaintiffs' testimonies (both Charles and Beverly Hale) were credible based upon Ms. Hale's recollection, which added detail to Mr. Hale's testimony. However, the Court does not find evidence that the prices were changed on the contracts on February 25, 2003, based upon a review of the red-lined plans. It was, in fact, Dave Horsley who negotiated both sets of contracts with the plaintiffs and there is insufficient evidence that Dwayne Horsley was involved with any price change at this point.

On April 17, 2003, the construction contracts were amended to reflect that the homes were being built on a cost-plus 10% basis. Both plaintiffs testified that they agreed to the amended contract based upon an understanding that they could save 20% of the cost of constructing the homes by building the homes at the same time. Horsley, on the other hand, testified that the parties had a discussion about savings if the houses were built simultaneously, but disputed that he indicated any percentage of savings. Regardless of whether plaintiffs' or defendant's recollection is accurate relative to a percentage, the testimony made clear to the Court that the savings could not be realized because plaintiffs' initial loans were insufficient to fully build the houses. Even under the previous fixed price contract, the loans that were necessary would have totaled \$1,526,000 (plaintiffs' Exhibits 6 and 8).

The loans the plaintiffs actually obtained were \$1,386,250 (\$774,250 from Applied Lending and \$612,000 from First Utah Bank). Applied Lending loaned funds for House 45 and both lots, but not House 46. The plaintiffs subsequently went to First Utah Bank to obtain a loan for House 46. As noted, however, the loans obtained were far short of even the previous fixed price contract, which was entered into before plaintiffs requested substantial changes and upgrades. Therefore the houses could not be built simultaneously because of the construction loans being insufficient. At some point the money for the construction of House 45 ran out, while building continued on House 46. Therefore, the fact that the plaintiffs did not realize a savings was a result of the loans obtained by the plaintiffs not being of sufficient amount to allow the houses to be completed simultaneously, as well as changes and upgrades requested by plaintiffs.

3 Plaintiffs have failed to prove that defendants breached the contract which required them to build the homes according to the plans and specifications: Although there was much disputed testimony, the Court finds that the plaintiffs sought substantial changes and upgrades to both homes during the construction project which changed the plans and which added costs to the project. Whether the Court considers plaintiffs' Exhibit 1, the red-lined plans, or Exhibits 2 and 3, the larger set of plans, the testimony made clear that plaintiffs requested numerous upgrades and modifications to the planned construction. Both

parties acknowledged that the contract requires written change orders and both parties also acknowledged that no written change orders were ever made. Plaintiff Charles Hale acknowledged that the two homes have all of the features depicted in the plans, in addition to numerous other upgrades. Charles Hale, Jr., who resided for a time in the house on Lot 46, also acknowledged that he requested changes to his home between the time the plans were completed and the home was constructed.

The Court finds based upon all of the testimony that the plaintiffs received two homes built according to their plans and specifications, plus substantial upgrades and modifications that they themselves requested. There was much disputed testimony relative to whether plaintiffs were kept advised of additional costs incurred during construction, and whether certain changes that were made to the homes were actually requested by them. The Court finds based upon the credibility of the witnesses that plaintiffs were kept informed of construction costs, as well as extra money required for upgrades and requested modifications.

Dwayne Horsley testified that he met with the plaintiffs on average four times per week, and that twice a week he had regularly scheduled meetings. This testimony was not disputed. The plaintiffs testified that they were frustrated from almost the beginning of the project that they did not receive accountings, information on costs of upgrades, or information on draws being taken by the corporation. Dwayne Horsley, on

the other hand, indicated that he kept the plaintiffs involved either through himself, personally, or through conversations with subcontractors, who knew the prices that additional items would cost. He testified that all of these costs were provided to the plaintiffs.

The Court finds that the plaintiffs' testimonies are not credible in that both are successful experienced businesspeople who testified that they have entered into contracts through their business they jointly own. It is not credible for the Court to assume that they continued to pay money for two houses being constructed over which they had no control, that they continued to ask for and not receive cost information and/or invoices, and yet they allowed the construction to continue until the houses were completed. Based upon the credibility of the witnesses, the Court finds that the plaintiffs were kept informed as to costs of construction, including upgrades, and that they had no issue with the costs at that time.

4 Plaintiffs have failed to prove breach of contract against defendants for failure to complete work on the homes in a good and workmanlike manner: Plaintiff Charles Hale testified that he kept a punch list of items that needed repairing or completed. Defendant Dwayne Horsley, on the other hand, testified that he completed all of the items and defective work that he had knowledge of prior to December 1 when his company left the project. Plaintiff Charles Hale acknowledged that he did not follow the requirements of the contract at Section 3.1, which

required a walkthrough and allowed the owner to escrow funds for completion of items. The Court finds that the defendant's testimony was credible as to items he completed and that plaintiffs failed to abide by the terms of the contract in obtaining completion of any others. The defendant Dwayne Horsley testified that the company left the project on December 1, 2004, when he was told by plaintiff Charles Hale that he hated the house and would not pay anything further. The Court finds based upon the evidence that the defendant repaired items made known to them and there is no evidence that things were left incomplete or completed improperly insofar as the items were known to them before December 1, 2004.

5 Plaintiffs have failed to prove that defendants breached the contract by overcharging plaintiffs for the home construction: Plaintiffs' expert, John Lipzinski, testified that the plaintiffs overpaid for the home in the sum of \$350,000. However, the Court finds that his testimony was not helpful and therefore discounts the witness's conclusions for the following reasons.

First, the witness did not accurately account for all of the invoices and also improperly deducted some costs (see Schedule 11) for which payments were not made by the plaintiffs. He also overlooked or discounted some invoices provided by the defendants. Additionally, plaintiffs were given credit for a \$30,000 payment to James Horsley which, as addressed below, the Court finds should not be credited as a

payment to Big H. Third, Mr. Lipzinski deducted items for which plaintiffs directly paid subcontractors reasoning that defendants had no participation with those items.

As to the \$30,000 payment, the Court finds, based upon the testimony of James Horsley, that the plaintiffs were advised that the payment was to James Horsley, personally, rather than the corporation. Additionally, even if his testimony is discounted, James Horsley had no actual or apparent authority to receive funds on behalf of Big H.

As to items for which plaintiffs paid subcontractors directly, defendant Dwayne Horsley disputed the lack of participation which made up a portion of Mr. Lipzinski's deductions. Horsley testified, and the Court finds credible, that the items in Schedule 6 that were deducted by Lipzinski as being handled by the Hales separate and therefore not eligible for the purpose of calculating Big H's profit were all matters in which Big H had substantial involvement. For example, Horsley testified that he helped the Hales make contacts with vendors, that he helped the plaintiffs work on the plans for landscaping, for installation that he supervised, and was involved in all of the work of the vendors and/or subcontractors. Therefore, the Court finds that the Lipzinski report does not accurately reflect either the total cost billed to the plaintiffs, nor the amounts that the plaintiffs paid for which they should receive credit.

6 The Court finds that the defendants have met their burden of proof in demonstrating that all costs they incurred in the construction of the home pursuant to the parties' contract were reasonable and that plaintiffs breached the contract by refusing to pay the sum owed:

Defendant's expert, Robert Nielson, testified as to the reasonableness of the final cost of Lot 45 and documented the completed home as built, comparing it to the plans. He testified that on House 45, the footprint was added to by almost 4,000 feet from the plans that the parties originally agreed to and set their budget upon. Space was added both on the interior and exterior, which added cost to the total project. He used two methods, the change order valuation method, and the square footage cost approach. Under both approaches, he testified that the actual cost incurred to build the home was reasonable based upon what the plaintiffs received. Additionally, he testified that the hard construction cost of Lot 45 was in the sum of \$1,494,257 based upon the invoices that he reviewed. Based upon that, he testified that in his opinion the builder's fee for Lot 45 should be the sum of \$149,425. Mr. Nielson did not do a separate analysis for Lot 46, except as the costs may have overlapped or have been shared with Lot 45. The Court, however, received defendant's Exhibits RR and SS which included invoices and payment documents supplied by defendants for both houses on Lots 45 and 46. Those invoices totaled \$2,740,649.

Based upon Mr. Nielson's testimony as to the reasonableness of the costs incurred for building House 45 and based upon Mr. Horsley's testimony as to the costs that they incurred and billed to the plaintiffs, the Court concludes that the costs incurred for the building of both homes was reasonable, and that as a result the defendants were entitled to a 10% fee in the sum of \$274,000 for both homes. Horsley testified that he received \$100,000 as a fee for House 46, but did not receive a fee for House 45.

7 The Mechanic's Lien filed by Big H was valid. Horsley testified that plaintiffs refused to pay the balance owed to Big H in late 2004. In December 2004, Charles Hale affirmed that he would pay nothing further, and that he hated the house. Big H left the project at that time, and filed the mechanic's lien on February 22, 2005.

Horsley also testified that when he prepared the lien that he filed in the sum of \$165,000, he relied on the invoices that he prepared in plaintiffs' Exhibits 31 and 32. Those invoices were correct and complete, he testified, up to that point. The total for both homes, as identified in plaintiffs' Exhibits 31 and 32, is close to the total of invoices in defendant's Exhibits RR and SS, which Mr. Horsley represented were the final invoices that he prepared. Based upon a review of all invoices, and after deducting the \$100,000 fee he received on House 46, the lien amount filed by defendant reflected less than the balance plaintiffs actually owed. Therefore, the Court finds that the mechanic's

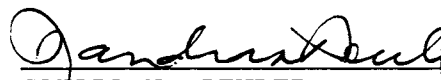
lien was not overstated, as it was not in excess of the amount owed and is a proper and valid lien amount.

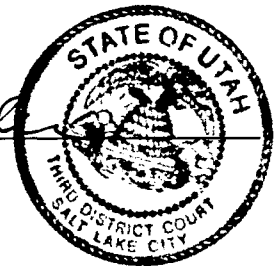
8 Defendant's mechanic's lien has priority over CitiBank's Trust

Deed: Defendant Dwayne Horsley testified that construction began on or around the time the building permit was issued on June 5, 2003. The plaintiffs signed and delivered to CitiMortgage (third party defendant) a Trust Deed on September 29, 2004. Defendants recorded the mechanic's lien on February 22, 2005. Pursuant to Utah Code Ann., § 38-1-5, the mechanic's lien takes priority over any lien that attached subsequent to June 5, 2003, and therefore it has priority over the CitiBank mortgage.

Defendants' counsel is requested to submit Findings, Conclusions, Order and Judgment that are consistent with the proposed findings submitted earlier, and that incorporate and support this ruling.

Dated this 8 day of February, 2010.


SANDRA N. PEULER
DISTRICT COURT JUDGE



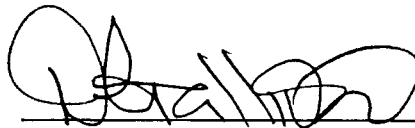
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 8 day of February, 2010:

Vincent C. Rampton
Attorney for Plaintiffs
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101

John T. Anderson
Attorney for Defendants
50 W. Broadway, Suite 700
Salt Lake City, Utah 84101

Robert J. Dale
Bradley L. Tilt
Attorney for Third Party Defendant CitiMortgage
215 S. State Street, Suite 1200
P.O. Box 510210
Salt Lake City, Utah 84151



Tab 2

MAY 25 2010

~~SALT LAKE COUNTY~~

By

Deputy Clerk

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and Kathleen E. McDonald of Jones, Waldo, Holbrook & McDonough. Defendant Dwayne Horsley was present personally and as a representative of defendant and counterclaim plaintiff, Big H Construction, Inc., both of whom were represented by their counsel, John T. Anderson of Anderson & Karrenberg. Third-party defendant, CitiMortgage, Inc., was represented by its counsel Bradley L. Tilt of Fabian & Clendenin.

The Court having read and considered the parties' pre-trial submissions; having heard and considered the representations, arguments and stipulations of counsel; having heard, considered, and assessed the credibility of the testimony provided by the parties and other witnesses at trial; having received and reviewed scores of trial exhibits; having issued several substantive rulings in its minute entry dated February 8, 2010 ("Minute Entry"); and having overruled plaintiffs' and third-party defendant's objections to (a) defendants' proposed Findings of Facts and Conclusions of Law, (b) defendants' proposed Judgment, and (c) defendants' requested attorney fees and costs; now makes the following:

FINDINGS OF FACT

A. Parties.

1. Plaintiffs, Charles F. Hale ("Mr. Hale") and Beverly I. Hale ("Mrs. Hale") (collectively "Hales"), are husband and wife who reside in Salt Lake County, Utah.

2. The Hales are intelligent and educated individuals. Both have considerable business and accounting or bookkeeping experience. Since 1994, they have been co-owners of a profitable family business known as "BC Technical," an entity operating in the medical imaging industry. As officers, directors and employees of BC Technical ("BC"), the Hales performed a multitude of business tasks that enabled them to understand and protect their financial interests in

the construction of the two homes at issue in this case. Specifically, by 2003 Mr. Hale had at least ten years of business experience in negotiating contracts, supervising financial and accounting functions, monitoring spending, supervising employees, and trouble-shooting issues. In his financial dealings, Mr. Hale is fully capable of recognizing and protecting his own financial interests, testifying (with respect to payments of builder's profit) that he "do[es] not give anything to anybody." Before her tenure with BC, Mrs. Hale served as a legal assistant for several years. Thereafter, Mrs. Hale served as BC's chief bookkeeper, with both hands-on and supervisory responsibilities for the maintenance and administration of the company's financial department, including accounts payable. In this position, she had responsibility for the payment of thousands of invoices submitted by BC's vendors. The Hales--in their joint management of BC's business, in their household budget affairs, and in their involvement in the contracts for, and the construction of, the subject homes--consulted with each other on any financial expenditure in excess of \$200 to \$300. Before they arranged for the construction of the two homes at issue in this case, the Hales had purchased three other houses, and this project was their first experience with having a house constructed.

3. Defendant and counterclaim plaintiff, Big H Construction, Inc. ("Big H"), is a Utah corporation with its principal place of business in Salt Lake County, Utah. Between at least 2002 and July 31, 2005, Big H was continuously licensed as a general contractor in the state of Utah.

4. Defendant, Dwayne Horsley ("Horsley"), is a resident of Salt Lake County, Utah, and the president of, and general building qualifier for, Big H.

5. Third-party defendant, CitiMortgage, Inc. ("CitiMortgage"), is a Delaware corporation that transacts business in the state of Utah, and which provided a loan to the Hales secured by a trust deed against one of the two parcels of real property at issue in this case.

B. Jurisdiction and Venue.

6. The obligations sought to be enforced under the Hales' amended complaint ("Complaint"), Big H's counterclaim ("Counterclaim") and Big H's third-party complaint ("Third-Party Complaint") were to be performed in Salt Lake County, Utah, and relate to the sale and construction of two custom homes, one on Lot 45 ("Lot 45 Home") and another on Lot 46 ("Lot 46 Home") (collectively "Homes") in the Triple Crown Estates Subdivision in South Jordan, Utah.

C. The Parties' Contracts.

7. In late 2002 or early 2003, Big H (principally through Horsley) and the Hales began discussing a potential arrangement for Big H's construction of the two custom Homes for the Hales. By February 2003, these discussions led to negotiations for an agreement to construct the Homes on land to be purchased by the Hales.

8. Although the parties always understood and intended that Big H would be compensated on a cost-plus ten percent (10%) profit basis, their initial written contracts reflected fixed prices that the Hales could submit to one or more lenders for construction financing.

9. The Hales and Big H accordingly executed four Real Estate Purchase Contracts for Residential Construction dated February 25, 2003 ("February 2003 Contracts"), two for the Lot 45 Home and two for the Lot 46 Home. One of the February 2003 Contracts for the Lot 45 Home reflects a purchase price of \$825,000, while another reflects a purchase price of \$1.1

million (“\$1.1 Million Contract”). The \$1.1 Million Contract price was provided to the Hales to help facilitate their procural of a construction loan. This price was provided without the benefit of any written plans or specifications, and included the cost of Lot 45, and there is insufficient evidence that Horsley was involved with any price change at that point.

10. Also on February 25, 2003, David Horsley (who is Horsley’s father, and a licensed real estate agent acting on behalf of Big H), prepared and provided to the Hales a separate Real Estate Purchase Contract (“Lot Purchase Contract”) with the owner of Lot 45 and Lot 46, Triple Crown Estates, LLC (“TCE”), whose manager, Steven Young, signed as seller. TCE agreed to sell Lot 45 and Lot 46 to the Hales based on a plea by Horsley’s brother, James Horsley (“James”), that TCE not sell the Lots to a third-party to whom the lots had been “somewhat promised.” Because (a) Big H had previously purchased several lots from TCE, (b) Mr. Young considered Big H to be a good home builder, (c) James was a close personal friend of Mr. Young’s son (Todd), and (d) James wanted TCE to reserve the Lots for, and sell them, to the Hales, TCE agreed to make the Lots available to the Hales. Even though the list price was \$144,500, TCE agreed, at James’ request, to reserve the Lots for the Hales for a price of \$134,500 per lot. Contrary to Mr. Hale’s sworn testimony,¹ neither he nor Mrs. Hale had any

¹ On the important issue of Mr. Hale’s credibility, the Court determines that he has little or none, generally, and on several key points, specifically. These include (a) his insistence (which was flatly contradicted by Mr. Young) that he, with absolutely no help from Big H or James, was responsible for locating, reserving and negotiating the two Lots, (b) his many contradictions and inconsistencies (as detailed in Big H’s October 28, 2009 Memorandum for Dismissal of Plaintiffs’ Misrepresentation Claims) regarding representations that Big H and Horsley supposedly made to induce him to sign the April 17, 2003 cost-plus addendum, (c) his insistence that he was essentially kept in the dark about, and had no influence or control over, the Costs of the Homes, (d) his assertion that he did not receive from any of the construction lenders a copy of the draw requests and attached invoices, when his own records produced in discovery show that he had two complete, duplicate sets, (e) his claim that he was stunned by the size, features and details of the additional 1,800 square feet of the bonus area, and (f) his general assertion that he and his wife spent about \$2.4 million in hard costs to construct the Homes with little or no idea of what was happening, to name just a few. His testimony on these and other issues was not believable, was inherently implausible, was

involvement in locating, reserving or negotiating the price of the Lots with TCE. As TCE's manager (Mr. Young) and James testified, the Lots were reserved, negotiated and contracted for solely through James, who was performing these services on behalf of Big H. According to the Hales' expert, John Lipzinski ("Lipzinski") of Project Analysts, contractor involvement of this type is an important factor in determining whether the price of the land is to be included in the costs against which the contractor's profit is calculated, especially where, as here, the Lots were acquired after the parties decided to employ a cost-plus arrangement.²

11. The February 2003 Contracts, generally, and the \$1.1 Million Contract, specifically were amended by an addendum dated April 17, 2003 ("Addendum").

12. The Addendum to the February 2003 Contracts ("Amended Contract") accurately reflects the parties' intent that the Lot 45 Home and the Lot 46 Home were to be constructed on a cost-plus basis under which the Hales were obligated to pay all reasonable costs (collectively "Costs"), plus a profit in an amount equal to ten percent (10%) of the Costs. Specifically, the Addendum states:

1. [Hales] are aware the Residential Construction Contracts do not reflect the true purchase price of the homes being built on Lots 45 and 46, Triple Crown Est[ates].
2. [Hales] are aware that homes are being built on a cost plus 10% basis.

13. The initial "Purchase Price" for the Lot 45 Home, as reflected in the \$1.1 Million Contract, was \$1.1 million. However, when the April 17 Addendum was signed, the "Purchase

contradicted by his own deposition testimony, and/or was contradicted by other credible witnesses such as Mr. Young and Mr. Horsley.

² Specifically, the closing on the Lots was on June 5, 2003, some six weeks after the April 17, 2003 Addendum formally confirming the parties' cost-plus arrangement. Digitized by the University of North Carolina at Chapel Hill Law Library. The original document, scanned by the University of North Carolina at Chapel Hill Law Library, may contain errors.

Price” became unspecified and open-ended, being replaced by a cost-plus formula under which the ultimate price became the sum total of the reasonable Costs of the Homes.

14. The Hales testified that they agreed to the Amended Contract based upon an understanding that they could save 20% of the cost of constructing the Homes by building them at the same time. Horsley, on the other hand, testified that the parties had a discussion about savings if the Homes were built simultaneously, but disputed that he indicated any percentage of savings. Regardless of whose recollection is accurate relative to a percentage, the testimony made clear to the Court that the savings could not be realized because the Hales’ initial loans were insufficient to fully build the Homes. Even under the previous fixed price contract, the loans that were necessary would have totaled \$1,526,000 (plaintiffs’ Exhibits 6 and 8). The gross amount of the loans the Hales actually obtained was about \$1,334,000 (\$722,000 from Applied Lending (Security National Life Insurance Co.)³ and \$612,000 from First Utah Bank). Applied Lending loaned funds for the Lot 45 Home and both lots, but not the Lot 46 Home. The Hales subsequently went to First Utah Bank to obtain a loan for the Lot 46 Home. As noted, however, the loans obtained were far short of even the previous fixed price contract, which was entered into before the Hales requested substantial changes and upgrades. Therefore, the Homes could not be built simultaneously because of the construction loans being insufficient. At some point, the money for the construction of the Lot 45 Home ran out, while building continued on the Lot 46 Home. Therefore, the fact that the Hales did not realize a savings was a result of these loans not being enough to allow the Homes, including the many requested changes and upgrades, to be completed simultaneously.

15. Horsley is not a party to the February 2003 Contracts, the Addendum, or the Amended Contract.

16. Section 14 of the Amended Contract contains an integration provision. It states:

14. **COMPLETE CONTRACT.** This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

17. Other than the April 17, 2003 Addendum, there are no signed substantive amendments to the 2003 Contracts.

D. The Scope of Work Under the Amended Contract for Lot 45 Significantly Expands, Both Before and After Construction Begins.

18. Section 12 of the Amended Contracts obligated Big H to build the two Homes in “substantial compliance” with agreed-upon plans and specifications.

19. The Hales claim that before they signed the February 2003 Contracts on February 25, 2003, they obtained and Mr. Hale red-lined an initial four-page, half-size set of plans (Exh. P-1) for the Lot 45 Home.⁴ The Hales (primarily through the testimony of Mr. Hale) further claim that they provided these plans to Big H before the \$1.1 Million Contract was signed on February 25, 2003. Although there was much disputed testimony, the Court finds that the Hales sought and received substantial changes and upgrades to both Homes, which changed the plans and added costs to the project. Whether the Court considers plaintiffs’ Exhibit 1, the red-

³ As noted in Finding No. 26 below, the net amount available for construction was only \$495,123.

⁴ These initial plans are generic, bare-bone and incomplete, depicting a home of about 6,000 square feet of finished living area with few design details. ~~These plans are not buildable.~~ J. Reuben Clark Law School, BYU.

lined plans, or Exhibits 2 and 3, the larger set of plans, the testimony made clear the Hales requested numerous upgrades and modifications to the planned construction. Both parties acknowledged that the contract requires written change orders and both parties also acknowledged that no written change orders were ever made. Mr. Hale acknowledged that the two Homes have all of the features depicted in the plans, in addition to numerous other upgrades. Charles Hale, Jr., who resided for a time in the Lot 46 Home, also acknowledged that he requested changes to the Lot 46 Home between the time the plans were completed and the Home was constructed.

20. The Court finds, based upon all the testimony, that the Hales received the two Homes in accordance with their plans and specifications, plus substantial upgrades and modifications that they themselves requested.

21. In late March 2003, the Hales obtained and soon provided to Big H a full-size, multiple page set of detailed plans and specifications (“March 2003 Plans”).⁵

22. At the Hales’ request, the March 2003 Plans were periodically and significantly modified during the next few months, increasing the total size of the building footprint of the Lot 45 Home from about 6,000 to 9,779 square feet. The finished living area of the Lot 45 Home increased from about 6,000 to about 8,500 square feet. The number of rooms increased from 25 to 31, and the number of equipment features (fireplaces, air conditioners, furnaces, etc.) increased from 5 to 14.

23. The scope of the Lot 45 Home, as-built, has 49 separate categories of expanded

⁵ The March 2003 Plans are Exh. P-2. Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU. Machine-generated OCR, may contain errors.

features ("Upgrades"), as itemized in the written report of Big H's expert, Mr. Nielson. According to Mr. Nielson, these Upgrades beyond what is depicted in the P-1 and P-2 plans have a value of about \$926,000.

24. Section 12 of the Amended Contract states in relevant part:

12. PLANS AND SPECIFICATIONS. No change shall be made to the plans and specifications except by a written Change Order signed in advance by Buyer and Seller which sets forth: (a) the change to be made; (b) any adjustment of the Purchase Price; and (c) any change in the Substantial Completion Deadline. All changes shall be paid for at the time of signing the Change Order or as mutually agreed in writing by the parties. Seller agrees to construct the Residence in substantial compliance with the plans and specifications.

25. There is no evidence that during the approximately 18-month period in which the Lot 45 Home was constructed, or during the approximately 8-month period that the Lot 46 Home was constructed, the parties prepared or executed any written change orders. There is, moreover, no evidence that the Hales ever requested any such change orders or objected to the fact that none were ever prepared or signed. Both parties, therefore, observed the Amended Contract's change order provision in the breach, engaging in a course of dealing in which they mutually dispensed with the requirement of written change orders.

E. The Hales Obtain Financing for Only a Portion of the Purchase and Construction of the Lot 45 Home.

26. In early May 2003, the Hales obtained from Security National Life Insurance Co. a loan ("Security National Loan") in the gross amount of \$722,000 to pay for a portion of the Lot 45 Home. Of this gross amount, \$194,000 was used to pay for the land on which the Lot 45 and 46 Homes were to be built; \$13,302 was used to pay loan settlement charges; and \$19,575 was

retained in an interest reserve account. Therefore, the net amount available from the Security National Loan for actual construction of the Lot 45 Home was only \$495,123.⁶

27. On May 6, 2003, the Hales signed an acknowledgement (Exh. GGG) that there was “a cash shortage” of \$162,500 in their Security National Loan. The actual shortage at that time, however, was substantially more, and only increased as the Hales subsequently requested and received the Upgrades beyond the features depicted in the Initial Plans.

28. In January 2004, the Hales obtained from Beehive Credit Union a loan (“Beehive Loan”) in the gross amount of \$1,200,000 for further construction of the Lot 45 Home.⁷ Of this gross amount, \$537,457 was used to pay-off the Security National Loan, and \$21,780 was used to pay loan settlement charges. Therefore, the net amount available from the Beehive Loan for actual construction of the Lot 45 Home was only \$640,763.

29. To help facilitate the Hales’ procural of the Beehive Loan, Big H provided Beehive with a two-page Construction Cost Breakdown, which projected (on the basis of the then-existing Plans and Specifications) that hard costs (which excludes builder profit) would be \$708,000.

30. As set forth in the Court’s Ruling dated December 29, 2009 and in Fact No. 14 above, neither Big H nor Horsley made any misrepresentations to the Hales to induce them to

⁶ While the Hales contend that the shortfall between the amount of financing and the projected cost of the Homes is due to “mistakes” made by David Horsley, the fact remains that it is the Hales who elected to go forward with the project financing on the terms he procured. Their decision to do so was and is their responsibility, not David Horsley’s. They ratified and accepted whatever “mistakes,” if any, he may have made.

⁷ Interestingly, although the Hales testified that by this point they were frustrated and upset by Big H’s management of the project, generally, and its purported failure to control the Costs, specifically, the Hales never proposed any changes to the way the construction loans had been administered, such as removing Big H from the draw process and replacing it with the Hales. It is a reasonable inference that the Hales’ decision to leave Big H as the party preparing and submitting construction loan draws reflects their general satisfaction with Big H’s management of the project through at least early 2004.

execute the February 2003 Contracts, to execute the April 17 Addendum, or to continue with the construction of the Homes.⁸

F. Big H Constructs the Lot 45 Home.

31. Between early June 2003 and early December 2004, Big H continuously constructed the Lot 45 Home and Upgrades in substantial compliance with the revised and expanded Initial Plans, as well as the Hales' periodic instructions. Although funding from the construction loans was not always available, work on the Lot 45 Home continued without interruption largely because of substantial, interest-free loan advances that Big H periodically made to the project.⁹ Specifically, between June 2003 and November 2004, these advances totaled more than \$727,000, and were even augmented on two occasions by personal loans of \$16,000 by James, and on another occasion by a loan of \$35,500 from Horsley's uncle, Randall Nelson. According to Schedule 8 of Mr. Lipinski's twice-revised cost and payment analysis, Big H was repaid only \$675,205 of the \$727,698 that it advanced to help assure completion of the project.

32. The Hales, by virtue of (a) frequently being on-site during the construction phase of the Lot 45 Home, (b) regularly meeting with Big H's representatives and Big H's

⁸ Specifically, the so-called "Cost Estimates" prepared for the Beehive Loan (Exhs. P-20 and P-21), are not actionable. Mr. Hale testified in his deposition that he did not see the written cost estimates (Trial Exhs. P-20 and P-21) at the time they were prepared in 2004. *See C. Hale Depo. at 72:8, 9* ("to answer your question, did they give us cost estimates, not that I remember."). Mrs. Hale testified at trial that she could not recall whether she saw the estimates at the time.

⁹ Big H was willing to make advances of this magnitude due to (a) Mr. Hale's assurances, as early as February 2003, that he was on the cusp of selling his family business (BC) for \$10 million cash, and (b) Big H's desire to move the project along.

subcontractors¹⁰ to discuss and agree upon projected Costs of depicted features and ordered Upgrades, (c) periodically receiving a copy of the Security National and Beehive construction loan draw requests, accompanied by invoices and other supporting documentation, (d) discussing between themselves any expenditures of more than \$200 or \$300, and (e) periodically making substantial direct payments to subcontractors and suppliers (Exh. JJ), were intimately familiar with the nature, extent and quality of work on the Lot 45 Home, as well as the Costs that had been and were being incurred and charged for the project. Moreover, Horsley testified that he met with the Hales on average four times per week, and that twice a week he had regularly scheduled meetings. This testimony was not disputed. The Hales testified that they were frustrated from almost the beginning of the project that they did not receive accountings, information on costs of upgrades or information on draws being taken by Big H. Horsley on the other hand, testified that he kept the Hales involved either through himself, personally, or through conversations with subcontractors, who knew the prices that additional items would cost. He testified that all of these costs were provided to the Hales. The Court finds that the Hales' testimony to the contrary is not credible in that both are successful experienced businesspeople who acknowledged that they had entered into many contracts in the business (CB) they jointly owned. It is not credible for the Court to assume that they continued to pay money for the two

¹⁰ The Court notes, for example, that Troy Stroud (the president of Stroud, Inc., which provided most of the exterior brick, rock and masonry materials and labor for both Homes) testified that he met frequently with Mr. Hale on-site to discuss and reach agreements about expanding the scope of work; that Mr. Hale was an unusually involved, proactive and informed owner; and that he was fully apprised of, and agreed to, all quoted costs. This testimony confirms Mr. Horsley's assertion at trial that he, on behalf of Big H, frequently met on-site with Mr. Hale and subcontractors to discuss and reach agreement on these issues. Mr. Stroud's testimony, moreover, further diminishes the credibility of Mr. Hale's trial testimony that he was rarely on site, was rarely consulted, and was largely kept in the dark about the nature, extent and cost of the work.

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Homes being constructed over which they had no control, that they continued to ask for but did not receive cost information and/or invoices, and yet they allowed the construction to continue until the Homes were completed. Based upon the credibility of the witnesses, the Court finds that the Hales were kept informed as to costs of construction, including upgrades, and that they had no issue with the costs at that time.

33. At no time before September 16, 2004 did the Hales object to any aspect of Big H's management of the project, generally, or the Costs that had been or would be incurred, specifically.

G. Big H Tracks and Accounts for Virtually All Costs and Payments on the Project, and the Hales Owe a Ten Percent Fee in the Principal Amount of \$162,875.

34. Big H maintained on an Excel spread sheet a written record of ongoing Costs and payments on the project. These records were periodically updated and adjusted to reflect recent activity. They were substantially accurate in fully tracking and accounting for the invoices generated and payments made of which Big H was aware. However, because the Hales decided from time-to-time that they wanted to pay some of the Costs directly from their own personal bank accounts (*see* Exh. JJ), and because they contracted directly with some of the 47 separate subcontractors and suppliers, they received directly from both Big H and several subcontractors and suppliers invoices in the aggregate amount of about \$400,000. The Hales failed to inform Big H of the amounts of many of these invoices and payments. Therefore, Big H, through no fault of its own, was not always able to include them in its updated spread sheet of Costs and payments. In any event, the Hales' expert, Mr. Lipzinski, did not testify that there were any

inaccuracies in Big H's final accounting (Exhs. RR and SS).¹¹ Mr. Lipzinski, moreover, did not challenge (and, indeed, accepted) the proposition that the Costs reflected in the invoices contained in the Exhs. RR and SS three-ring binders were consistent with each other -- in other words, that every item for which the Hales were invoiced had a corresponding value that was incorporated in their Lot 45 Home. As Mr. Lipzinski testified, he (a) found no instances where the amount of Costs for materials and labor reflected in the invoices were excessive, unreasonable or above-market, and (b) concluded that all Costs for which the Hales were billed were reflected in the invoices that he reviewed as part of his analysis and reports.

35. Schedule 2 of the revised written report of the Hales' expert ("Lipzinski Report"), as again orally adjusted by Mr. Lipzinski on the final day of trial, quantifies the total Costs for both the Lot 45 Home and the Lot 46 Home (not including the land) at about \$2,414,843. According to Exh. RR (the three-ring binder of invoices and payment records that Big H generated as part of this lawsuit to substantiate its claims with respect to the Lot 45 Home), \$1,721,000 of Costs (including the price of Lot 45)¹² were incurred on the Lot 45 Home. This updated figure is slightly more than the amount contained in the cost report (Exh. P-32) that Big H used to quantify the dollar amount (\$165,000) to be inserted in its mechanic's lien.

36. Therefore, \$1,721,000 of Costs were incurred and paid for the Lot 45 Home. This entitles Big H to an earned fee ("Fee") in the principal amount of \$172,100.

¹¹ He did testify that Big H's initial accounting on the Lot 45 Home (Exh. P-31) had duplications in the amount of about \$16,000.

¹² Inclusion of the price of the land as a Cost on which the profit is calculated is not, as the Hales argue, precluded by the principle that commissions for the sale or purchase of real property can be paid only to licensed real estate brokers or affiliated agents. Neither Big H nor anyone else is claiming that the Hales owe such a commission as part of their acquisition of Lot 45 from TGE. Rather, Big H is simply claiming that the price of the land, i.e., its cost -- once it has been acquired -- is a "Cost" on which its agreed-upon fee is to be paid.

37. The written report and testimony of Big H's expert, Robert Nielson ("Nielson Report"), confirms that the hard Costs for the Lot 45 Home were reasonably incurred, and that the Hales received value from these Costs far in excess of what they were actually billed. Mr. Nielson's expert opinion that the Costs were reasonably incurred rests on two established methodologies: determining reasonableness through an analysis of (a) what the Costs were on a change-order, adjusted cost-of-the-work approach, and (b) what the Costs were on a per-square-foot, comparable value approach. The reasonableness of the Costs, generally, and Mr. Nielson's expert opinion of reasonableness, specifically, are further confirmed and substantiated by the written appraisal report that was prepared for the Hales' take-out lender (CitiMortgage, Inc.) in late August 2004 (Exh. PP), which establishes that the value of the Costs at that point (some three months before the Lot 45 Home was fully completed) was at least \$1,397,000. In summary, therefore, the reasonableness of the Costs is established by: (a) the fact that the Hales ordered, and Big H provided, every material and service reflected in the invoices contained in the Exhs. RR and SS three-ring binders; (b) the fact that there is no credible evidence that the Hales timely objected to any specific Cost as it was being incurred; (c) the fact that the invoices in Exhs. RR and SS appear to be accurate reflections of the actual Costs for which Big H was billing; (d) the fact that Mr. Lipzinski found no evidence that any billed Cost was excessive, unreasonable or above-market; (e) the fact that Mr. Lipzinski concluded that all Costs of the Home were accurately reflected in the Exhs. RR and SS invoices; (f) the fact that Mr. Nielson confirmed the reasonableness of the Costs through his two (change order and comparable price per-square foot) analyses; and (g) the fact that the total amount of Costs for the Lot 45 Home is close to its appraised fair-market value.

38. The Hales have not paid any portion of the \$172,100 Fee owed to Big H as of early December 2004.

39. Although the Hales claim they should be credited for a \$30,000 payment made through a check issued and delivered to James on about November 3, 2004, the Court determines, for several reasons, that this payment was not made to Big H and is not a credit to the Hales. These reasons include:

- a. James had no actual authority to receive payments on behalf of Big H, inasmuch as (i) he was not a shareholder, officer, director or management employee of Big H, (ii) neither Big H nor Horsley ever delegated such authority to James, and (iii) there is no evidence that James appears in any Big H records maintained by the Utah Division of Corporations.
- b. James had no apparent authority to receive payments on behalf of Big H, inasmuch as (i) there is no evidence that Horsley ever stated, or otherwise led the Hales to believe, that James had authority to accept payments on behalf of Big H, (ii) the Hales (as well as their son, Charles, Jr.) were well aware that the Hales' delay in paying the agreed-upon 10% Fee created enormous tensions between Horsley and James that had led to numerous arguments between them, (iii) the Hales should reasonably have understood that James was merely a site superintendent on the project and not a Big H management member, and (iv) the Hales well understood that James wanted the check to pursue a personal investment opportunity in a start-up mortgage company.

- c. It was otherwise unreasonable for the Hales to have expected James to apply the \$30,000 check to Big H's account, inasmuch as (i) they knew James intended to immediately invest all the funds in a start-up company, (ii) they failed to designate Big H as a joint payee, (iii) they failed to have James (or Big H) sign a restrictive endorsement, (iv) they had never, in the entire history of their BC family business, issued to an individual a check intended for a business entity creditor,¹³ (v) they never informed Horsley (or Big H) of this payment before this lawsuit was filed, and (vi) at the time they issued the check to James, they were in an adversarial relationship with Big H, making it incumbent upon them to clearly inform Big H of the payment to assure that it was aware of it.

H. When the Hales Refuse to Pay any Portion of the Owed Fee, Big H Files a Mechanic's Lien.

40. Section 3 of the Amended Contract states (with emphasis in original) in relevant part:

3. SETTLEMENT AND CLOSING. Seller shall provide Buyer written notice of Substantial Completion of the Residence. Settlement shall take place on the Settlement Deadline referenced in Section 24(g), or on a date upon which Buyer and Seller agree in writing. 'Settlement' shall occur only when **all** of the following have been completed . . . (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office, as appropriate, in the form of collected or cleared funds.

41. Section 3.1 of the Purchase Contract states in relevant part:

¹³ As Mrs. Hale testified at trial, when she paid accounts on behalf of the family business (BC), she was always careful to assure that invoices were paid to the correct payee, since she knew it is difficult to recover the payment if it is directed to the wrong creditor.

3.1 WALK-THROUGH INSPECTION/COMPLETION

ESCROW. [Before] Settlement, Buyer may conduct a 'walk-through' inspection of the Residence. If, as of Settlement, minor work remains to be completed, corrected or replaced on the Residence, then Buyer, pending completion of such work, may withhold in escrow at Settlement, a reasonable amount agreed to by Seller and Buyer (or such other amount as is required by the lender) sufficient to pay for completion of such work.

42. Pursuant to section 10.2 of the Amended Contract, Big H agreed to provide a one-year warranty "against defects in material and workmanship for a period of one year after the Settlement Deadline."

43. The "Settlement Deadline" on the Lot 45 Home and the Lot 46 Home was early December 2004 and early February 2004, respectively. With respect to the Lot 45 Home, however, the Hales failed to pay any portion of Big H's ten percent Fee, as required by section 3(b) of the Amended Contract (which states that they are to deliver "any money required to be paid . . . in the form of collected or cleared funds"), and failed to establish and fund an escrow account "sufficient to pay for completion of [any allegedly defective or incomplete] work," as required by section 3.1 of the Amended Contract.

44. During late 2004, Big H made several requests on the Hales to participate in a final meeting to identify and quantify all Costs and payments. The Hales refused to do so and Mr. Hale declared that he hated the Lot 45 Home, asserting that no ten percent Fee was owed.¹⁴ In response, Big H left the project after completing all punch list items of which it was aware at the time.

¹⁴ While he denied at trial that he said this, the Court finds that he has little, if any, credibility. *See*, note 1 at page 5 above. If, as he testified, he was mostly pleased with the Lot 45 Home, this is yet another reason that he and his wife should pay the full amount of Big H's earned Fee.

45. Big H then caused to be prepared and recorded against Lot 45 a Notice of [Mechanic's] Lien ("Lien Notice") dated February 22, 2005. The Notice appears as Entry No. 9304860 in the office of the Salt Lake County Recorder, and seeks the principal amount of \$165,000. Because this figure is less than what the Hales owed at that time, and there is no evidence that the lien amount was intentionally overstated (i) with the intent to cloud title to the Lot 45 Homes, (ii) to exact from the Hales more than was due, or (iii) to procure any unjustified advantage or benefit within the meaning of section 38-1-25(d) of the Utah Mechanic's Lien Act, Utah Code Ann. §§ 38-1-1 et seq. ("Act"), the Hales have failed to establish the elements necessary to recover any statutory penalties against Big H.

46. Horsley is not a party to, and has no rights or obligations under, the Lien Notice. There is no evidence that any actions that Horsley took were for his personal benefit. All such actions were taken solely on behalf of Big H.

47. Because the last substantial work on the Lot 45 Home was completed at the end of November 2004, the recording of the Lien Notice on February 22, 2005 was timely under section 38-1-7 of the Act.

48. Big H timely notified the Hales of the Lien Notice pursuant to section 38-1-7 of the Act, and took all action required by the Act in the perfection and foreclosure of the Lien Notice.

I. The Hales Have Failed to Prove Any Damages.

49. The principal basis for the Hales' position that Big H not only is not entitled to receive any portion of its agreed-upon ten percent (10%) profit Fee, but is also obligated to pay substantial damages, is the analysis performed and written report prepared by their expert, Mr.

Lipzinski (“Lipzinski Analysis and Report”). The Lipzinski Analysis and Report, however, was not helpful to the Court. It is riddled with numerous flaws in the way that its figures are formatted, reported and analyzed. From a macro perspective, the cumulative weight of these flaws -- especially when viewed in the context of Mr. Lipzinski’s repeated refusal at trial to acknowledge the existence of, and make appropriate adjustments for, many of his errors -- leaves the Court with little or no confidence that his Analysis and Report is reliable. The Court, therefore, declines generally to accept any of Mr. Lipzinski’s conclusions.

50. From a micro perspective, specific flaws in the Lipzinski Analysis and Report include:

- a. Significant Fluctuations in the Bottom-Line “Owed” Amount. Mr. Lipzinski’s February 2008 initial report asserted that the Hales had overpaid to, and were entitled to recover from, Big H an amount of \$504,223.72. In his August 2009 amended report, this figure dropped to \$359,363. On the last day of trial, Mr. Lipzinski further reduced this figure to \$116,994. Even this figure, however, lacks any evidentiary support, and has been improperly manipulated to reflect an “owed” amount where none actually exists. See Subsections (b)-(f) below.
- b. Schedule 11 Double Dip for “Overpayments.” A substantial portion of the damages that the Lipzinski Analysis and Report purports to quantify is found in his Schedule 11 (Overpayments and Underpayments). Mr. Lipzinski testified on the last day of trial that his Schedule 11 amount of “overpayments” had dropped to \$80,348 from the \$311,944 figure reflected in his initial report, and the \$195,989 figure reflected in his revised report. This “final” figure, however, is

not accurate. It constitutes an improper double counting (double dip) because the two categories of amounts that result in the \$80,347.88 figure (as reflected in his Schedule 1 Summary) include exactly the same Schedule 2 invoice amounts and Schedule 9 payment amounts that are already reported and subtracted from each other in the first (top) box of Schedule 1 of the Report. This generates an “additional overpayment” amount in Schedule 11 by using the same costs and payments already reflected in Schedules 2 and 9, thereby improperly debiting Big H twice for the same dollar. To avoid a double recovery by the Hales, therefore, the entire \$80,348 of “overpayments” in Schedule 11 must be disregarded.

c. Schedule 11 “Underpayments”. Schedule 11 has a category titled “Underpayments,” which is then reflected in the third line of the Schedule 1 Summary as a deduction from the Costs on which Big H’s Fee is to be calculated. This figure in the amount of \$126,793.43, however, cannot be used as a debit against Big H for several reasons, including:

- i. Mr. Lipzinski testified that most of his nearly 100 other expert engagements included the issue of accounting for overpayments and underpayments on a project, and that he had developed a damage model over the years that adequately and accurately reflected the financial effect of so-called “underpayments” on a construction project. However, while his initial report contained a column in Schedule 11 entitled “Underpayments,” he neither quantified these “underpayments” nor applied them as a debit against Big H

the first day of the first phase of trial in August 2009 that Big H was entitled to a credit for several invoices in excess of \$200,000. The timing of Mr. Lipzinski's decision to include these "underpayments" as a way of trying to cushion a portion of the financial swing in Big H's favor from the Court's ruling, casts substantial doubt on the credibility of his decision to suddenly include the "underpayments" as a debit against Big H. This is especially true where his pre-existing damage model apparently never treated "underpayments" as a debit against the contractor.

- ii. In order to accurately determine the net financial effect to an owner from a series of overpayments, on the one hand, and underpayments, on the other, these payments should, at the very least, be netted out against each other, before the resulting figure, if any, is carried forward to Schedule 1. Mr. Lipzinski, however, repeatedly refused to make this adjustment, even in the face of the simple double entry bookkeeping illustration that Big H's counsel provided at trial -- an illustration that demonstrates the fallacy of the "overpayment" and "underpayment" figures in Schedule 11.¹⁵
- iii. While there appears to be merit to the suggestions of Big H's counsel at trial that it might be appropriate to account for the "underpayments" by simply subtracting them from the Costs on which the 10% Fee gets calculated, as

¹⁵ The illustration was based on two hypothetical transactions, one of which was a \$5,000 "overpayment," and one of which was a \$5,000 "underpayment." Under basic accounting principles, these debits and credits are netted-out to reflect the actual financial effect to the obligor and obligee, resulting in no damage to the owner. Under Mr. Lipzinski's damage model, however, these two amounts are treated improperly as a \$10,000 debit against Big H.

opposed to applying the “underpayments” as a dollar-for-dollar debit against Big H, Mr. Lipzinski refused (inappropriately, in the Court’s view) to modify his draconian use of “underpayments” as a financial penalty against the contractor.

- iv. The amount of “underpayments” that Mr. Lipzinski calculated for inclusion in the Schedule 1 Summary of his February 2008 initial report was zero. The “underpayments” included in his August 2009 revised report were \$87,425. On the last day of trial, however, he suggested that this figure had actually increased to \$126,793, even though he had made other adjustments to correct mistakes in his revised report that Big H’s counsel exposed through cross-examination the two previous days. Wholly apart from the obvious point that an “underpayment” cannot, definitionally, constitute a financial detriment or damage to an owner responsible for paying costs and a ten percent fee, Mr. Lipzinski’s use of steadily increasing “underpayments” as a method of increasing damages that the Hales supposedly sustained is not proper. It must be disregarded in its entirety.

- d. Schedules 4 and 5. The \$73,094.87 of alleged damages reflected in these Schedules should be disallowed for several reasons:

- i. Mr. Lipzinski himself labeled the amounts in these Schedules as “estimates,” and acknowledged at trial that they were less accurate and precise than his Schedule 2, 9 and 11 calculations. Given his concession and the Court’s

determination that Schedules 2, 9 and 11 are riddled with numerous substantive flaws, there is little for the Court to credit in Schedules 4 and 5.

- ii. All of the allegedly defective and/or incomplete work items reflected on Schedules 4 and 5 constitute minor punch list items. Section 3.1 of the Amended Contract sets forth a specific procedure for the identification and resolution of punch list items by “withhold[ing] in escrow at Settlement a reasonable amount agreed to by Seller and Buyer sufficient to pay for completion of such work.” *See* Finding Nos. 40-44 above. Because the Hales failed to follow this punch list procedure, and because the Hales materially breached the Amended Contract by early December 2004 when they refused to pay any portion of Big H’s 10% Fee, the Hales are precluded from recovering any of the items in Schedules 4 and 5.
- iii. Most, if not all, of the items reflected in Schedule 5 (relating to Lot 46 Home punch list items) constitute warranty items. The settlement deadline on the Lot 46 Home was early February 2004 when a certificate of occupancy was issued, from which point the one-year warranty commenced. Because the Hales failed to make any warranty claim during the applicable 12-month period, or to assert any warranty claim in this lawsuit, they are precluded from recovering any of the amounts in Schedule 5.
- e. Schedule 6: Although Mr. Lipzinski conceded near the end of trial that the Costs incurred for Artisan Cabinetry and Sure Appliance should not have been excluded from the amount against which Big H’s 10% Fee is to be calculated, he

improperly excludes from Schedule 6 of his Analysis and Report \$157,065 of Costs incurred for Sunline Landscaping and Meitler Metal Works from the calculation of Big H's 10% fee. There is no basis for the exclusion of these Costs. Horsley testified that these subcontractors were hired by Big H and that Big H supervised this work. The purchase order and invoices reflect that Big H was designated as the responsible party to whom deliveries were to be made. Big H, therefore, is entitled to include these Costs of \$157,065 as part of the figure on which its 10% fee is calculated.

- f. Schedule 3. Several items reflected on this Schedule as "Unsubstantiated Costs" are not valid. Specifically, if an item on Schedule 3 is truly "unsubstantiated," it is not appropriate to reflect on Schedule 9 any payments made for the "unsubstantiated" amounts. The Lipzinski Analysis and Report, however, reflects that he did so on several occasions. By way of example (as Big H's counsel demonstrated through cross-examination on the last day of trial), this occurred with respect to at least the following items:

Beehive Glass	\$ 774.00
Pella Windows	739.52
Architectural Concrete	1,440.00
Valley Sand & Gravel	1,997.61
Metro Waste	22.32
D Mac Dist.	4,727.57
CJ Heating	1,230.00
Big Rock Plumbing	<u>1,000.00</u>
TOTAL	\$11,931.02

As such, this amount of \$11,931.02 should either be added as a compensable Cost

to Schedule 2 or subtracted as a payment from Schedule 9. In either fashion, the

bottom-line amount of “damages” quantified in Schedule 1 must be reduced by an additional \$11,931.02.

49. For at least the foregoing reasons, the Hales are not entitled to recover from Big H or Horsley any of the alleged damages identified and quantified in either the revised Lipzinski Analysis and Report or as further orally revised on the final day of trial. These claimed damages simply have not been proven with reasonable certainty.

J. Attorney Fees.

50. Section 17 of the Amended Contract and section 38-1-18 of the Act provide that the prevailing party is entitled to recover its costs¹⁶ and reasonable attorney fees. By prior agreement of the parties, the amount is to be established by post-trial affidavit.

51. Big H is the prevailing party under (a) each of the seven claims in the Hales’ Amended Complaint (for an accounting, declaratory judgment, misrepresentation, breach of contract, invalidity of mechanic’s lien, slander of title, and abuse of lien right), (b) each of the two principal claims in its Counterclaim (for breach of contract and foreclosure of mechanic’s lien), and (c) its Third-Party Complaint against CitiMortgage.

52. Big H and Horsley were represented in this case by the law firm of Anderson and Karrenberg (“A&K”). The A&K lawyer principally responsible for the engagement was John T. Anderson (“Anderson”), who personally performed most of the legal services for Big H and Horsley in this case (“Case”).

¹⁶ As noted in Conclusion No. 5 below, the “costs” that Big H is entitled to recover under the Amended Contract are not limited to awardable “costs” under Rule 54(d) and the cases interpreting it.

53. Anderson has been licensed to practice law in Utah since 1977, specializing in commercial litigation. During his nearly thirty-three years in private practice, Anderson has worked on several thousand litigation matters, spanning several practice areas, including contracts, business torts, real property, fiduciary misconduct, lender liability, and construction law. He has conducted over 250 trials in state and federal courts in Utah, Arizona, and Nevada, as well as at least ten arbitration hearings.

54. A&K began representing Big H and Horsely in the Case in June 2005. At all times, its lawyers and paralegals maintained contemporaneously completed time records in the form of daily time sheets that fully and accurately reflected all work performed in the Case.

55. During each month that these time sheets were completed during the engagement, an A&K staff support employee periodically inputted the time sheet entries and information into a computer database. Each month, Anderson received a hard-copy print-out of time entries to review and, if necessary, revise to assure the accuracy and completeness of all billings in the Case. The same general procedure was followed by all A&K timekeepers who performed work in the Case.

56. A copy of the computer-generated report of itemized time ("Itemization") that A&K lawyers and paralegals devoted to the Case between June 7, 2005 and April 20, 2010 is attached hereto as Exhibit A. It reflects, and the Court finds, that A&K billed \$325,630 of fees and \$16,610.84 of costs during that nearly five-year time period.

57. Neither the Hales nor CitiMortgage have disputed that (a) there was a need for A&K to perform the legal services described in the Itemization, (b) the legal services were actually performed, or (c) the services took too long to perform.

58. One of the Hales' principal challenges to the amount of A&K's requested fees is that Anderson's billing rates between 2005 and 2010 were and are supposedly above those customarily charged by other lawyers with similar experience and expertise in the Salt Lake City, Utah legal market. The Court finds, however, that Anderson's billing rates are reasonable, for several reasons, including:

- a. His billing rates, which started at \$275 per hour in 2005 and increased to \$375 per hour in 2010, are within the normal range of what he typically charged during those years.
- b. According to the information in and appended to Anderson's sworn affidavit of fees, his rates were and are within the range charged by Salt Lake City lawyers at the time with similar experience and expertise in lawsuits of this type.
- c. While Anderson sometimes granted other clients slightly discounted billing rates when they had an established record of being consistently punctual in the payment of A&K's bills, this was the first time that A&K had represented Big H and Horsley. Therefore, A&K reasonably determined that Big H and Horsley did not qualify for a reduced rate.
- d. At the outset of the Case, Anderson reasonably (and, it appears, accurately) predicted that the Case would be highly contentious, professionally demanding, and time consuming. He also discerned that because the underlying facts were extensive, complicated and hotly disputed, they would require significant time, creative energy and diligent attention. These evident demands on his time and

attention further support the reasonableness of the billing rates he employed during the Case.

e. The billing rates of the Hales' counsel, Vincent Rampton and Kathleen McDonald, while lower than Anderson's, do not provide a valid comparison for assessing the reasonableness of Anderson's rates. For example, it appears that the Hales were the beneficiaries of a discounted billing arrangement, under which Mr. Rampton's law firm handled several legal matters (including this Case) for the Hales and their family businesses for a fixed or capped fee. Therefore, the amount of his firm's total billings to the Hales in the Case (about \$200,000) does not detract from the reasonableness of A&K's claimed fees. In addition, the 2010 billing rate of Mr. Rampton (a lawyer with three years less legal experience than Anderson) is \$290 per hour. Finally, Ms. McDonald's 2010 billing rate of \$205 per hour (for an associate with only five years of legal experience) tends to prove the reasonableness of Anderson's \$375 per hour billing rate (for a lawyer with nearly 33 years of legal experience).

f. For each calendar year after 2005, Anderson's billing rate in the Case increased by about 2% to 8% per year. This increase appears to be reasonable.

g. The result that A&K achieved in this case -- dismissal of all seven claims that the Hales asserted, and judgment for the full amount that Big H sought -- further supports the reasonableness of Anderson's billing rates.

59. Under the facts and circumstances of the Case, none of A&K's claimed fees can or need to be allocated. Each of the seven claims in the Hales' Amended Complaint (all of

which are to be dismissed with prejudice), on the one hand, and the two principal claims in Big H's Counterclaim (on which Big H has prevailed), on the other, are inextricably connected with each other. Moreover, all of the fees that Horsely incurred in his successful defense against the Hales' claims are intertwined with, and subsumed by, the fees that Big H necessarily and reasonably incurred in its defense of the Hales' claims and its prosecution of the Counterclaim. In addition, Big H is not required to allocate between fees expended on Lot 45 and those for Lot 46. The Hales, from the inception of the Case, alleged and attempted to prove that debits on Lot 46 should be applied against Big H on Lot 45. To that end, they had their expert, Mr. Lipzinski, attempt to quantify damages not only on the Lot 45 Home, but also the Lot 46 Home. They did so with the intent of not only offsetting the amount claimed by Big H's Mechanic's Lien, but recovering substantial damages against both Big H and Horsley. In other words, the thrust of the Hales' theory of damages throughout the Case was to extinguish Big H's claimed profit on the Lot 45 Home by applying debits from both the Lot 45 Home and the Lot 46 Home. Therefore, every dollar of fees that Big H was forced to incur to defeat the Lot 46 debits was a dollar spent to validate their right to recover for breach of contract and secure that right through its Mechanic's Lien against the Lot 45 Home. This means that every reasonably billed dollar of fees that was necessary to prevail on Big H's Lot 45 Home claims is fully recoverable, even as to fees incurred to rebut the Hales' Lot 46 Home claims and defenses.

60. In determining the reasonableness of A&K's claimed fees, the court has considered such factors as the legal work performed, the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of the hours spent on the litigated claims, the fee customarily charged in the locality, the expertise of the attorneys, and the result obtained.

K. Third-Party Complaint: CitiMortgage.

61. The Court's Finding of Fact No. 4(a) and (b) (submitted by CitiMortgage), dated February 2, 2009, is incorporated herein by reference.

62. Big H's first work on the Lot 45 Home (in June 2003) precedes the date on which CitiMortgage recorded its trust deed ("CitiMortgage Trust Deed") against the Lot 45 Home (October 4, 2004). Big H's Lien Notice, therefore, has priority over the CitiMortgage Trust Deed, and CitiMortgage has adduced no evidence or advanced any argument to establish that the priority of Big H's Lien Notice can or should be supplanted or adjusted for any reason.

CONCLUSIONS OF LAW

1. Under Utah law, a contractor such as Big H is entitled to recover on its contract if it proves that it "substantially complied with its provisions." *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 426 (Utah App. 1994) (quoting *Ryan v. Curlew Irrigation Co.*, 104 P. 218, 221 (Utah 1909)). Big H has met that standard in this case.

2. The Hales' refusal to pay any portion of the Fee (a) warranted Big H's filing of the Lien Notice, and (b) is a prior, material and unexcused breach of the Amended Contract.

3. As a proximate result of the Hales' breach of the Amended Contract, Big H has suffered damages in the principal amount of \$172,100, plus interest at the rate of ten percent (10%) per annum from December 1, 2004 to the date on which judgment is entered, and thereafter at the rate of 2.41% per annum.

4. All of the claims in the Hales' Amended Complaint should be dismissed with prejudice as against both Big H and Horsley.

5. Big H is the prevailing party under each of the seven claims in the Hales' Amended Complaint and each of the two principal claims in Big H's Counterclaim. As such, Big H is entitled to recover from the Hales, as established by the previously submitted affidavits and other filings, (a) its necessary and reasonable attorney fees in the amount of \$325,630 (for the period of June 7, 2005 to April 20, 2010), and (b) its costs (which, under *Krantz v. Heritage Imports*, 71 P.3d 188, 196-97 (Utah App. 2003) and *Chase v. Scott*, 38 P.3d 1001, 1005 (Utah App. 2001), include all of Big H's demonstrated costs, not just those authorized by Utah R. Civ. P. 54(d) and the cases that interpret it), in the amount of \$16,610.84.

6. Big H is the prevailing party under its lien foreclosure claim against the Hales and its Third-Party Complaint against CitiMortgage. As such, Big H is entitled to an order (a) foreclosing its Lien Notice against Lot 45 and the Lot 45 Home; (b) declaring that the Lien is valid, and (under section 38-1-5 of the Act) senior in prior to any interest of the Hales and the CitiMortgage Trust Deed against Lot 45 and the Lot 45 Home; and (c) decreeing that Lot 45 and the Lot 45 Home be sold pursuant to judicial order and decree, with the proceeds thereof applied toward the payment of the full amount of Big H's Judgment, interest, costs, and after-accruing attorney fees pursuant to section 38-1-18 of the Act.


7. As ordered in the Minute Entry dated May 4, 2010, counsel for Big H and Horsley are directed to submit a form of Judgment in conformity with these Findings of Fact and Conclusions of Law.

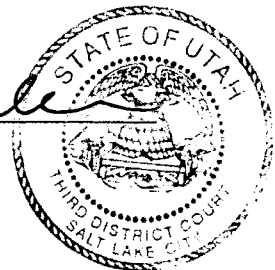
5. Big H shall be, and it hereby is, granted judgment against Charles F. Hale and Beverly I. Hale and CitiMortgage, Inc. that the Property be sold pursuant to the provisions of the Utah Mechanic's Lien Act, Utah Code Ann. §§ 38-1-1, *et seq.*, to satisfy all amounts owed by the Hales to Big H under this Judgment.

6. This Judgment may, at the request of Big H, be augmented to include future incurred (post-April 20, 2010) attorney fees and costs in an amount to be substantiated by affidavit to be filed with the Court and served on all counsel. Counsel are entitled to file objections to any such request(s).

DATED: May 25, 2010.

BY THE COURT:


Honorable Sandra N. Peuler
Third District Court Judge



APPROVED AS TO FORM:

JONES WALDO HOLBROOK & McDONOUGH, PC



Vincent C. Rampton
Attorney for Plaintiffs and Counterclaim Defendants

FABIAN & CLENDENIN, PC

Bradley L. Tilt
Attorney for Third Party Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of May 2010, I caused a true and correct copy of
FINDINGS OF FACT AND CONCLUSIONS OF LAW to be served via first-class mail,
postage prepaid, to the following:

Vincent C. Rampton
Kathleen McDonald
Jones Waldo Holbrook & McDonough, PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Bradley L. Tilt
Fabian & Clendenin, PC
215 South State Street, 12th Floor
Salt Lake City, Utah 84111-2323



Big H Construction

Billing Fees

<u>Date</u>	<u>Timekeeper</u>	<u>Rate</u>	<u>Hours</u>	<u>Total</u>	<u>Description</u>
6/7/2005	28	275.00	0.70	192.50	Telephone conference with Mr. and Mrs. Horsley re: Hale lawsuit; telephone call to and draft letter to Mr. Maddox re: same; open new file.
6/16/2005	28	275.00	3.00	825.00	Read and analyze Maddox file documents in Hale case; outline relevant issues to be pursued; telephone conference with counsel and telephone conference with Ms. Horsley re: case issues
6/17/2005	28	275.00	1.50	412.50	Conference with Mr. and Mrs. Horsley re required action.
6/23/2005	28	275.00	0.10	27.50	Telephone conference with Hales' counsel re: default issues.
6/27/2005	28	275.00	0.20	55.00	Telephone conference with Hales counsel and Amy re: case issues.
6/28/2005	28	275.00	0.40	110.00	Read and forward letter from Hales' counsel; telephone conference with Ms. Horsley re: same.
7/18/2005	28	275.00	7.50	2,062.50	Read Mr. Horsley's narrative and hundreds of pages of invoices and other documents; prepare instructions to paralegal re: creating chart of expenses and cost ledger; draft answer and counterclaim; order foreclosure report for lien foreclosure; revise and rework narrative and time line.
7/19/2005	8	15.00	3.50	52.50	Sort invoices and compare client claims with actual amounts.
7/19/2005	28	275.00	0.50	137.50	Revise and finalize Answer and Counterclaim.
7/20/2005	8	15.00	4.00	60.00	Organize invoices from Big H Construction and total the costs of client claim v. actual costs.
7/20/2005	8	15.00	2.00	30.00	Organize invoices from Big H Construction and total the costs of client claim v. actual costs.
7/20/2005	28	275.00	0.40	110.00	Telephone conference with title company re: foreclosure report issues; work with paralegal re: sorting and quantifying costs for invoices.
7/21/2005	28	275.00	1.00	275.00	Conference with Dwayne re: case issues.
7/23/2005	28	275.00	0.50	137.50	Review paralegal cost calculations from available documents.
7/26/2005	8	15.00	2.00	30.00	Organize invoices from Big H Construction and total the costs of client claim v. actual costs.
8/1/2005	28	275.00	0.40	110.00	Read foreclosure report; telephone conference with Mr. Horsley.
8/2/2005	4	75.00	0.33	24.75	Research re Citimortgage, Inc.; research New Mexico, Delaware and New York Divisions of Corporations.
8/2/2005	28	275.00	2.00	550.00	Draft third party complaint on lien foreclosure claim; finalize answer and counter-claim; telephone conference with Mr. Horsley; revise and update narrative and time line.
8/3/2005	4	75.00	1.30	97.50	Research re Citibank Federal Savings Bank.
8/3/2005	28	275.00	2.50	687.50	Review and finalize answer, counterclaim and third-party complaint; prepare and answer for service of two summonses on third-party complaint; draft letter to counsel and letter to client re: same; draft Notice of Pendency of Action and letter to Recorder re: same; telephone conferences and with lenders and South Jordan Building Inspection Office.
8/16/2005	28	275.00	0.60	165.00	Conference with Mr. Horsley re case issues.
8/26/2005	28	275.00	0.20	55.00	Read reply to counterclaim; telephone call to counsel re: meeting to address case issues; telephone call to Mrs.

Big H Construction
Billing Fees

9/6/2005	28	275.00	1.00	275.00	Prepare for and attend meeting with counsel and Horsleys.
9/7/2005	28	275.00	1.00	275.00	Draft discovery plan and case management order; draft letter to counsel re same; telephone conference with Mr. Horsley.
9/12/2005	28	275.00	0.20	55.00	Teleconference with CitiMortgage counsel re lien priority issue; telephone conference with Beehive Credit Union re loan term issues.
9/15/2005	28	275.00	0.10	27.50	Teleconference with Ms. Horsley re several case issues.
9/27/2005	28	275.00	0.60	165.00	Partial draft of court ordered Initial Disclosures, teleconference with Ms. Horsley and draft letter to court re Case Management Order.
10/1/2005	28	275.00	1.00	275.00	Draft initial disclosures.
10/5/2005	28	275.00	2.00	550.00	Draft, revise and finalize expanded Initial Disclosures; several telephone conferences with Mr. and Mrs. Horsley re: same.
10/18/2005	28	275.00	0.20	55.00	Teleconference with James Horsley re mechanics lien issue.
10/24/2005	28	275.00	0.20	55.00	Review Hales' Initial Disclosures and draft letter to Ms. Horsley re same.
11/14/2005	4	75.00	0.75	56.25	Review and organize billing statements/invoices.
11/14/2005	28	275.00	0.50	137.50	Resolve document production issues with Mr. Horsley and paralegal.
11/17/2005	28	275.00	0.50	137.50	Assemble documents for bates stamping and producing documents to counsel; conference with paralegal re same; teleconference with counsel re document production and related issues.
11/18/2005	4	75.00	1.25	93.75	Bates number and log documents.
11/21/2005	4	75.00	1.50	112.50	Continue to bates number and log invoices.
11/21/2005	28	275.00	0.50	137.50	Read and final approval of documents to be produced to counsel and draft letter to counsel re same.
11/22/2005	28	275.00	0.50	137.50	Resolve document production issues; teleconference with counsel for CitiBank Mortgage.
12/6/2005	28	275.00	0.70	192.50	Conference with Mr. Horsley and teleconference with counsel re case issues.
12/12/2005	28	275.00	0.20	55.00	Read and forward additional information to counsel.
12/13/2005	28	275.00	0.10	27.50	Teleconference with Citi-Financial counsel re lien priority issues.
12/20/2005	28	275.00	0.70	192.50	Read Answer to Third-Party Complaint and Counterclaim of CitiMortgage, read mechanic's lien documents to formulate required response.
12/28/2005	28	275.00	5.50	1,512.50	Draft Reply to CitiMortgage Counterclaim; draft first set of interrogatories and document requests; research re: several mechanic's lien issues asserted in affirmative defenses.
12/29/2005	28	275.00	2.50	687.50	Draft revised Case Management Order and letter to counsel; revise and finalize Reply to CitiMortgage Counterclaim; revise and finalize Big H's first set of discovery requests; draft letter to counsel and letter to client re above.
1/27/2006	28	300.00	0.10	30.00	Telephone conference with CitiMortgage's counsel re: procedural issues.
1/30/2006	28	300.00	1.40	420.00	Read Hales' papers challenging mechanic's lien. Read cited statutory provisions. Draft letter to client re: same.
1/31/2006	28	300.00	0.50	150.00	Revise scheduling order and draft letter to counsel re: same.

Big H Construction

Billing Fees

2/7/2006	28	300.00	0.20	60.00	Telephone conference with counsel re: procedural issues. Telephone conference with James re: same.
2/8/2006	28	300.00	0.50	150.00	Conference with Horsleys re: case issues.
2/23/2006	28	300.00	0.10	30.00	Telephone conference with Hales counsel re: case issues.
3/6/2006	28	300.00	0.20	60.00	Draft letter to court re: amended scheduling order.
3/24/2006	28	300.00	0.10	30.00	Telephone conference with counsel re: discovery issues.
4/4/2006	28	300.00	0.05	15.00	Telephone conference with counsel re: need to receive requested documents.
4/5/2006	28	300.00	1.50	450.00	Read and determine how to better organize several hundred pages of documents produced by Hales; telephone conference with Mr. Horsley re: case issues
4/11/2006	28	300.00	1.25	375.00	Draft answer to amended complaint, counterclaim and third-party complaint; telephone conference with Mr. Horsley re: same; revise narrative and time line.
4/11/2006	28	300.00	4.45	1,335.00	Continue reading 875 pages of produced documents and responses to discovery requests from Hales; arrange for copying of same and draft letter to Horsleys.
4/12/2006	28	300.00	1.00	300.00	Read 100 additional documents provided by Hales and forward to Big H.
4/20/2006	28	300.00	0.50	150.00	Prepare for meeting with clients.
4/21/2006	28	300.00	1.60	480.00	Meet with clients re: various case issues.
5/8/2006	28	300.00	0.10	30.00	Telephone conference re: mediation.
5/16/2006	28	300.00	8.20	2,460.00	Read and analyze entire file to determine required discovery and prepare for meeting with Horsleys; draft several subpoenas duces tecums and deposition notices; draft letter to counsel re: several case issues with Mr. Horsley; lengthy conference with Mr. Horsley re: several case issues
5/17/2006	28	300.00	7.00	2,100.00	Revise and finalize subpoenas, deposition notices and letters to third-party lenders; finalize letter to counsel; prepare for and conduct second meeting with Mr. Horsley regarding document and discovery issues; conduct research re change order issues; lienability of contractor profit and lien timeliness; update time line documents.
5/18/2006	28	300.00	0.40	120.00	Follow up regarding discovery issues.
5/22/2006	28	300.00	0.20	60.00	Resolve subpoena issues with Applied Lending.
5/24/2006	28	300.00	0.50	150.00	Address and resolve discovery issues.
5/26/2006	28	300.00	0.10	30.00	Telephone conference with counsel regarding deposition and discovery issues.
6/1/2006	28	300.00	1.50	450.00	Evaluate several case issues; determine further required discovery; telephone conference to counsel regarding same.
6/2/2006	28	300.00	0.50	150.00	Resolve discovery issues; telephone conference with counsel regarding the same.
6/7/2006	28	300.00	0.10	30.00	Telephone conference with counsel regarding discovery issues.
6/8/2006	28	300.00	5.00	1,500.00	Read several hundred pages of documents provided by 3 lenders in response to Subpoena Duces Tecum; draft letter to counsel regarding deposition issues; revise narrative.
6/9/2006	28	300.00	0.70	210.00	Read Hales' discovery requests; draft letter to client regarding the same.
6/12/2006	28	300.00	0.35	105.00	Schedule and notice of required depositions.

Big H Construction
Billing Fees

6/13/2006	28	300.00	1.00	300.00	Conference with Horsleys regarding discovery responses and related case issues.
6/26/2006	28	300.00	0.10	30.00	Telephone conference with Citi Mortgage counsel regarding July 19 deposition issues.
6/27/2006	28	300.00	0.40	120.00	Resolve discovery response issues.
6/29/2006	28	300.00	4.00	1,200.00	Begin preparing for Hales depositions; designate documents as exhibits to deposition.
6/30/2006	28	300.00	8.50	2,550.00	Prepare for 7/19 deposition; reread hundreds of documents and designate scores of exhibits for photocopying; supervise bate-stamping of hundreds of documents produced by various lenders of Hales.
7/3/2006	28	300.00	1.50	450.00	Telephone conference with Mr. Horsley regarding discovery responses issues; organize file batch of documents for deposition preparation and July 7 meeting with Mr. Horsley; draft letter to Aimee regarding Hales check request.
7/5/2006	28	300.00	3.00	900.00	Begin drafting responses to Hales' discovery requests (based on currently available file information and documents); telephone conference with counsel regarding depositions and document production issues; update time line.
7/6/2006	28	300.00	0.20	60.00	Telephone conference with Rob Nielsen to engage him as expert to determine and quantify upgrades and rebut defect claims.
7/6/2006	28	300.00	0.50	150.00	Continue drafting responses to Hales' interrogatories.
7/7/2006	28	300.00	7.00	2,100.00	Continue drafting responses to interrogatories; assemble and organize documents for meeting with Mr. Horsley; meeting with Horsleys regarding numerous case issues; continue deposition preparation; formulate issues for Mr. Nielsen
7/8/2006	28	300.00	5.00	1,500.00	Continue drafting numerous responses to Hales' interrogatories based on additional information provided by Horsleys and from review and analysis of file documents; revise narrative.
7/10/2006	28	300.00	5.50	1,650.00	Review and finalize responses to discovery requests; oversee assembly and copying of produced documents; draft letter to counsel regarding same; conference with Horsleys to review and revise discovery responses; read and analyze marked-up plans regarding upgrades; telephone conference with South Jordan Building Office.
7/11/2006	28	300.00	2.50	750.00	Final edit discovery responses and letter to counsel; assemble and produce additional documents; obtain and read documents produced by Citibank counsel.
7/13/2006	28	300.00	0.40	120.00	Resolve Citibank documents issues.
7/14/2006	28	300.00	0.30	90.00	Telephone conference with counsel adverse to Hales in BC Technical lawsuit to determine status of Hales' refusal to close and pay amounts owed to broker.
7/17/2006	28	300.00	0.50	150.00	Resolve Hales deposition issues.
7/25/2006	28	300.00	0.25	75.00	Resolve deposition and related issues with counsel and Mr. Horsley.
7/26/2006	28	300.00	0.40	120.00	Resolve deposition issues with counsel and Mr. Horsley.
7/28/2006	28	300.00	1.25	375.00	Renote depositions; draft final set of contention interrogatories; telephone conference with counsel regarding same.
7/31/2006	28	300.00	0.40	120.00	Telephone conference with Mr. Horsley regarding Hales' case issues; continue search for BC Technical lawsuit documents.

Billing Fees

8/1/2006	28	300.00	1.10	330.00	Draft supplement to second set of requests for production of documents; telephone conference with counsel regarding same.
8/2/2006	28	300.00	0.10	30.00	Telephone conference with counsel regarding discovery issues.
8/17/2006	28	300.00	0.15	45.00	Telephone conference with Hales' counsel and telephone conference with CitiMortgage counsel regarding document production and deposition issues.
8/18/2006	28	300.00	2.00	600.00	Follow up regarding document production issues; conference with Dwayne regarding numerous case and deposition issues.
8/19/2006	28	300.00	4.00	1,200.00	Prepare for Hales' depositions.
8/21/2006	28	300.00	2.50	750.00	Perform analysis of upgrades to plans and obtain and read CitiMortgage appraisals.
8/22/2006	28	300.00	5.50	1,650.00	Final preparation for Hales depositions; carefully analyze 5 separate appraisals to identify and update list and value of upgrades; conference with expert re upgrades.
8/23/2006	28	300.00	5.75	1,725.00	Conduct depositions of Charles Hale, Sr.; conference with Horsleys regarding same.
8/24/2006	28	300.00	0.60	180.00	Assemble and arrange for bate-stamping of additional documents; draft letter to counsel regarding same and deposition issues.
8/25/2006	28	300.00	0.50	150.00	Supervise document control stamping and finalize letter to counsel; telephone conference with Dwayne regarding same.
8/31/2006	28	300.00	0.10	30.00	Telephone conference with counsel regarding deposition scheduling and document production issues; telephone conference with Dwayne regarding same.
9/1/2006	28	300.00	0.10	30.00	Negotiate additional deposition dates.
9/8/2006	28	300.00	0.25	75.00	Negotiate additional deposition dates and draft required notices.
9/11/2006	28	300.00	0.40	120.00	Telephone conference with Dwayne re case issues.
9/12/2006	28	300.00	1.00	300.00	Resolve deposition and document production (red-lined plan) issues with counsel and Dwayne; telephone conference with Aimee regarding RT Cabinetry check.
9/25/2006	28	300.00	0.90	270.00	Read additional documents provided by Hales' counsel (red-lined plans and contract documents).
10/7/2006	28	300.00	6.00	1,800.00	Read Hale Sr. deposition and al exhibits and prepare for 10/11 deposition of Hale, Jr. and Mrs. Hale.
10/9/2006	28	300.00	1.50	450.00	Conference with D. Horsley regarding 10/11 deposition issues.
10/10/2006	28	300.00	1.20	360.00	Final preparation for 10/11 depositions.
10/11/2006	28	300.00	3.50	1,050.00	Prepare and conduct depositions of Mrs. Hale and Hale, Jr.; conference with Horsleys regarding same.
10/13/2006	28	300.00	0.30	90.00	Read several subpoena duces tecums and draft letter to Mr. Horsley regarding same.
10/16/2006	28	300.00	0.40	120.00	Address and attempt to resolve RT Cabinetry payment issues with Aimee and counsel.
10/18/2006	28	300.00	0.20	60.00	Telephone conference with Mr. Horsley regarding deposition and subpoena issues.
10/30/2006	28	300.00	0.05	15.00	Telephone conference with counsel regarding subcontractor deposition and document issues.
11/10/2006	28	300.00	0.10	30.00	Telephone conference with counsel regarding case issues.
11/13/2006	28	300.00	0.10	30.00	Draft letter to counsel regarding need for requested documents.

Big H Construction
Billing Fees

11/15/2006	28	300.00	1.10	330.00	Read and forward subcontractor documents to Mr. Horsley.
11/30/2006	28	300.00	0.10	30.00	Telephone conference with counsel regarding required action.
12/5/2006	28	300.00	0.30	90.00	Draft letter to counsel regarding demand for documents; telephone conference with Mr. Horsley regarding same.
12/14/2006	28	300.00	0.30	90.00	Telephone conference with counsel and telephone conference with Mr. Horsley regarding document production and deposition issues.
12/21/2006	28	300.00	0.05	15.00	Telephone conference with counsel.
12/26/2006	28	300.00	1.20	360.00	Read cost documents provided by counsel; telephone conference with and draft letter to Dwayne regarding same.
12/28/2006	28	300.00	0.80	240.00	Conference with Horsleys regarding construction cost and related case issues.
1/4/2007	28	325.00	0.10	32.50	Telephone conference with client and counsel regarding deposition issues.
1/10/2007	28	325.00	0.35	113.75	Resolve deposition issues with counsel and clients; draft letter to client regarding same.
1/11/2007	28	325.00	0.05	16.25	Resolve deposition issues with counsel.
1/18/2007	28	325.00	0.10	32.50	Address and resolve deposition scheduling issues.
1/19/2007	28	325.00	0.10	32.50	Resolve deposition scheduling issues.
1/31/2007	28	325.00	0.10	32.50	Resolve deposition issues.
2/1/2007	28	325.00	4.50	1,462.50	Read and highlight numerous relevant pleadings, discovery responses, deposition exhibits, and cost documents to prepare Horsleys for depositions; update narrative and time line.
2/2/2007	28	325.00	3.20	1,040.00	Meet with Horsleys to prepare for their depositions.
2/5/2007	28	325.00	0.20	65.00	Address and resolve deposition issues.
2/7/2007	28	325.00	7.00	2,275.00	Review file documents to prepare for David Horsley deposition; meet with Mr. Horsley regarding same; attend David Horsley deposition; conference with Horsleys re same.
2/8/2007	28	325.00	1.00	325.00	Telephone conferences with counsel and Mr. Horsley regarding discovery issues; draft letter to counsel regarding same; telephone conference with construction expert.
2/12/2007	28	325.00	0.30	97.50	Resolve expert retention issues.
2/15/2007	28	325.00	2.50	812.50	Prepare for and conduct meeting with Horsleys and Rob Nielsen regarding expert engagement issues.
2/19/2007	28	325.00	1.00	325.00	Draft subpoena duces tecum to Stock Building Supply; draft deposition notice and letter to deponent; telephone conference with Mr. Horsley re: case issues.
2/20/2007	28	325.00	0.20	65.00	Revise, finalize and arrange for service of subpoena duces tecum to Stock Building Supply.
2/27/2007	28	325.00	0.05	16.25	Discuss scheduling issues with counsel.
3/5/2007	28	325.00	0.10	32.50	Telephone conference with Stock Building Supply counsel regarding subpoena issues.
3/13/2007	28	325.00	1.50	487.50	Draft several additional subpoenas and deposition notices for additional suppliers and subcontractors.
3/14/2007	28	325.00	2.20	715.00	Finalize and arrange for service of subpoenas and deposition notices; read additional documents produced by Hales; draft letter to client regarding same.
3/15/2007	28	325.00	1.20	390.00	Draft additional deposition notices and subpoenas duces tecum and cover letters on suppliers and subcontractors.

Big H Construction

Billing Fees

3/20/2007	28	325.00	0.50	162.50	Telephone conference with clients and counsel regarding deposition issues; follow-up on service of subpoena issues.
3/21/2007	28	325.00	0.30	97.50	Telephone conference with Mr. Horsley regarding file documents and telephone conference with server regarding subpoena issues.
3/22/2007	28	325.00	2.00	650.00	Conference with Horsleys regarding several case issues (compilation of costs and discovery points).
3/26/2007	28	325.00	0.20	65.00	Telephone conference with Mark Campbell (subcontractor) regarding subpoenaed documents and related issues.
3/27/2007	28	325.00	0.50	162.50	Telephone conferences with two subcontractors regarding documents requested by subpoena.
3/28/2007	28	325.00	0.50	162.50	Read Staker documents and forward to Mr. Horsley.
3/29/2007	28	325.00	0.40	130.00	Telephone conferences with subcontractors regarding subpoena duces tecum issues.
4/2/2007	28	325.00	0.50	162.50	Resolve deposition dates with counsel and Mr. Horsley; telephone conference with subcontractors regarding Subpoenas Duces Tecum.
4/3/2007	28	325.00	1.30	422.50	Read and arrange for stamping of documents provided by Stock Building Supply; telephone to additional subcontractors; email to counsel.
4/4/2007	28	325.00	0.50	162.50	Read and forward Artisan Woodwork documents.
4/5/2007	28	325.00	0.15	48.75	Confirm deposition dates with counsel and Mr. Horsley.
4/9/2007	28	325.00	1.50	487.50	Conference with two subcontractors (Jorgenson and Campbell) regarding subpoenaed documents; read and arrange for bate stamping same; letter to Mr. Horsley regarding same.
4/10/2007	28	325.00	0.15	48.75	Telephone with Ready Made Builders regarding subpoenaed documents.
4/11/2007	28	325.00	0.60	195.00	Read, arrange for bate stamping and forward Ready Made Builders documents.
4/19/2007	28	325.00	2.50	812.50	Assemble and review files to prepare Horsleys for depositions; conference with Horsleys regarding same.
4/23/2007	28	325.00	2.75	893.75	Prepare Ms. Horsley for her deposition; defend deposition of Ms. Horsley.
4/24/2007	28	325.00	0.30	97.50	Resolve deposition issues with counsel and Mr. Horsley.
5/10/2007	28	325.00	2.50	812.50	Read and analyze Mr. Horsley's updated binder of cost documents; telephone conference with Mr. Horsley and draft letter to counsel.
5/16/2007	28	325.00	0.20	65.00	Telephone conference with counsel and telephone conference with Mr. Horsley re lot 46 cost issues
5/22/2007	28	325.00	0.20	65.00	Telephone conference with Mr. Horsley and telephone conference with counsel re Lot 46 construction cost issues
6/4/2007	28	325.00	0.70	227.50	Read Lot 46 binder of documents; draft letter to counsel regarding same.
6/15/2007	28	325.00	0.20	65.00	Schedule and confirm client depositions.
6/16/2007	28	325.00	0.10	32.50	Telephone conference with Mr. Horsley and voicemail to counsel regarding deposition rescheduling.
7/18/2007	28	325.00	3.10	1,007.50	Meet with James Horsley; attend and defend James Horsley deposition; conference with D. Horsley re same.
7/19/2007	28	325.00	9.00	2,925.00	Meet with D. Horsley regarding deposition preparation; attend and defend Dwayne Horsley deposition; conference with Mr. Horsley re: same; draft memo to file

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9/4/2007	28	325.00	0.20	65.00	Telephone conference with counsel and telephone conference with Mr. Horsley regarding same.
9/17/2007	28	325.00	0.05	16.25	September 13 telephone to counsel regarding house inspection issues.
10/1/2007	28	325.00	0.30	97.50	Coordinate Hale home inspection with counsel, Mr. Nielson and Mr. Horsley.
10/9/2007	28	325.00	0.20	65.00	Telephone conference with counsel, expert and Mr. Horsley regarding October 16 home inspection.
10/11/2007	28	325.00	0.20	65.00	Coordinate home inspection issues.
10/12/2007	28	325.00	0.50	162.50	Coordinate site visit with counsel, Mr. Horsley and Mr. Nielson; brief Mr. Nielson re relevant issues.
10/18/2007	28	325.00	4.00	1,300.00	Travel to and from and conduct site inspection with Messrs. Horsley and Nielson; conference with Mr. Horsley re: same
11/27/2007	28	325.00	0.20	65.00	Telephone conference with Mr. Horsley and telephone conference with Mr. Nielsen (retained expert) regarding case issues.
1/3/2008	28	350.00	0.20	70.00	Telephone conference with Mr. Horsley and telephone to expert regarding case issues.
1/10/2008	28	350.00	3.00	1,050.00	Read and analyze Mr. Nielson's draft expert report; lengthy telephone conference with Mr. Nielson and telephone conference with Mr. Horsley regarding same; draft designation for filing with court.
1/11/2008	28	350.00	0.30	105.00	Telephone conference with Mr. Nielson and telephone conference with Mr. Horsley regarding expert report; telephone to counsel regarding same.
1/14/2008	28	350.00	0.50	175.00	Conference with Mr. Horsley and telephone conference with Mr. Nielson regarding expert report issues.
1/18/2008	28	350.00	1.50	525.00	Read and analyze draft expert report; telephone conferences with Mr. Horsley and Mr. Nielson regarding same.
1/22/2008	28	350.00	0.40	140.00	Read final report; email to Mr. Horsley regarding same.
1/30/2008	28	350.00	0.35	122.50	Revise and finalize expert designation.
2/7/2008	28	350.00	1.00	350.00	Read and forward Hale expert report to Mr. Horsley.
2/9/2008	28	350.00	2.00	700.00	Analyze Hale expert report.
2/11/2008	28	350.00	1.50	525.00	Telephone conference with Mr. Horsley regarding expert report issues; locate and read 2004 appraisal; telephone conference with and email to Citi Mortgage counsel regarding need for additional appraisal.
2/14/2008	28	350.00	3.00	1,050.00	Prepare for and conduct meeting with Horsleys and Nielson regarding expert report issues.
2/15/2008	28	350.00	0.40	140.00	Telephone conference with Mr. Horsley regarding rebuttal to Hales' expert report.
2/25/2008	28	350.00	0.50	175.00	Follow-up regarding expert report and appraisal issues.
2/27/2008	28	350.00	0.20	70.00	Telephone conference with Mr. Dale and telephone conference with Mr. Horsley regarding appraisal and expert report issues.
2/28/2008	28	350.00	0.20	70.00	Telephone conference with Mr. Horsley and Mr. Nielson regarding expert report issues.
2/29/2008	28	350.00	2.70	945.00	Conference with Mr. Horsley regarding expert report and related case issues; read 2004 appraisals of subject property; telephone conference with Mr. Alvey (Appraiser)
3/5/2008	28	350.00	1.00	350.00	Read Mr. Horsley's binder of documents rebutting expert report to determine required action.

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3/7/2008	28	350.00	4.00	1,400.00	Read Mr. Horsley's multi-volume responses/rebuttals to expert report; reread expert report; outline potential rebuttals to report
3/11/2008	28	350.00	3.00	1,050.00	Conference with Mr. Horsley regarding expert report rebuttal issues.
3/12/2008	28	350.00	0.20	70.00	Schedule and notice expert deposition.
3/14/2008	28	350.00	1.00	350.00	Prepare for deposition of Hales' expert.
3/17/2008	28	350.00	6.00	2,100.00	Prepare for expert deposition; analyze Mr. Horsley's binders and narrative to rebut expert conclusions and underlying premises; reread contract documents, plans and other documents referenced in report.
3/18/2008	28	350.00	5.00	1,750.00	Continue preparing for expert deposition; extensive cross-referencing against Big H 3-ring binders.
3/19/2008	28	350.00	2.00	700.00	Continue preparing for expert deposition.
3/20/2008	28	350.00	1.00	350.00	Read Mr. Horsley's additional schedules and comments to expert report; telephone conference with Mr. Horsley regarding same.
3/22/2008	28	350.00	7.50	2,625.00	Prepare for and conduct meeting with Mr. Horsley regarding line-by-line and schedule-by-schedule rebuttal to expert report; resume deposition prep; more cross-referencing against Big H document binders.
3/25/2008	28	350.00	1.25	437.50	Read additional documents provided by Mr. Horsley regarding expert report rebuttal.
3/26/2008	28	350.00	7.00	2,450.00	Prepare for deposition of Hale's expert. (Includes over 4.5 hours of cross-referencing hundred of invoices and payment records against report's schedules.)
3/27/2008	28	350.00	6.50	2,275.00	Prepare for and conduct deposition of Hale's expert; read Nielson report for March 28 deposition.
3/28/2008	28	350.00	7.25	2,537.50	Prepare for and defend deposition of Mr. Nielson; conference with Mr. Horsley and Mr. Nielson regarding same and Hale expert report issues. (Schedule 11 Double Dip, etc.)
4/16/2008	28	350.00	0.50	175.00	Review file, determine required action; draft certificate of readiness for trial.
4/18/2008	28	350.00	0.50	175.00	Address and resolve Nielson deposition issues; telephone conference with counsel regarding procedural issues.
4/24/2008	28	350.00	0.10	35.00	Resolve deposition issues with counsel.
4/30/2008	28	350.00	0.20	70.00	Resolve deposition issues with Mr. Nielson.
5/13/2008	28	350.00	4.00	1,400.00	Read Hale depositions and relevant documents to substantiate demand for dismissal of misrepresentation claim; draft letter to counsel regarding same.
5/14/2008	28	350.00	3.25	1,137.50	Prepare for two depositions of Stroud and Beehive Glass; revise and finalize letter to counsel regarding dismissal of misrepresentation claim.
5/15/2008	28	350.00	2.60	910.00	Prepare for and attend 1 of 2 scheduled depositions; revise and finalize letter to counsel regarding misrepresentation claim.
5/20/2008	28	350.00	0.25	87.50	Telephone conference with Mr. Horsley and telephone conference with counsel regarding mediation and related issues.
8/8/2008	28	350.00	0.50	175.00	Telephone conferences with Dwayne and counsel regarding case issues.
8/22/2008	28	350.00	0.35	122.50	Prepare for and conduct telephone scheduling conference with court and counsel; telephone conference with Mr. Horsley.

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9/8/2008	28	350.00	0.50	175.00	Address and resolve mediation issues with Mr. Horsley and counsel.
9/19/2008	28	350.00	0.40	140.00	Resolve mediation schedule issues with counsel and Mr. Horsley.
10/9/2008	28	350.00	4.00	1,400.00	Review files of pleadings, expert reports and appraisals to draft detailed file memo re trial issues and elements of proof; draft mediation brief; lengthy telephone conference with Mr. Horsley
10/10/2008	28	350.00	1.50	525.00	Draft mediation brief; telephone conference with Mr. Horsley and telephone conference with Mr. Nielson regarding case issues. [Omit from fee request]
10/14/2008	28	350.00	1.00	350.00	Prepare for mediation hearing; telephone conference with Mr. Horsley re: same. [Omit from fee request]
10/15/2008	28	350.00	3.50	1,225.00	Prepare for, meet with and conduct mediation with Horsleys. [Omit from fee request]
1/13/2009	28	370.00	6.00	2,220.00	Begin preparing for trial; start drafting Rule 26 pretrial disclosures.
1/14/2009	28	370.00	4.00	1,480.00	Read several hundred documents to designate trial exhibits.
1/15/2009	28	370.00	4.00	1,480.00	Prepare for and conduct meeting with Mr. Horsley re numerous trial preparation issues.
1/21/2009	28	370.00	1.50	555.00	Revise and finalize pretrial disclosures; read Hale's PD's.
1/22/2009	28	370.00	3.00	1,110.00	Travel to and from Orem and meeting with Keith Beckstead to discuss his 2004 appraisals of lot 45 home and arrange for his trial testimony.
1/23/2009	28	370.00	4.25	1,572.50	Assemble and read cost-plus contract cases and materials for jury instructions and cross-examination of Hales' expert.
1/26/2009	28	370.00	3.00	1,110.00	Outline and draft memo in support of motion for order in limine. (Misrep Claim)
2/6/2009	28	370.00	2.50	925.00	Read accumulated papers; prepare for and meet with Mr. Horsley re trial preparation.
2/9/2009	28	370.00	1.00	370.00	Research and analyze D. Horsley personal liability issues under mechanics lien act.
2/17/2009	28	370.00	1.00	370.00	Attend pretrial; telephone conference with Mr. Horsley.
3/31/2009	28	370.00	2.00	740.00	Draft order in limine memo (20% cost savings).
4/2/2009	28	370.00	2.00	740.00	Draft order in limine memo (Horsley personal liability).
4/6/2009	28	370.00	1.00	370.00	Revise and rework in limine memo (Horsley personal liability).
4/10/2009	28	370.00	1.00	370.00	Revise and rework in limine memo (20% Cost Savings).
5/13/2009	28	370.00	4.00	1,480.00	Draft opposition to motion in limine re reasonableness of costs; analyze Stroud issues; prepare chart; reread Stroud deposition and exhibits.
5/14/2009	28	370.00	4.00	1,480.00	Draft responses to 3 motions in limine.
5/29/2009	28	370.00	4.00	1,480.00	Prepare for trial.
6/16/2009	28	370.00	5.00	1,850.00	Revise and finalize several motions in limine papers; prepare for and meet with engaged expert (Nielson) re trial preparation.
6/24/2009	28	370.00	4.25	1,572.50	Draft findings of fact and conclusions of law.
6/26/2009	28	370.00	0.75	277.50	Attend pretrial conference.
6/27/2009	28	370.00	8.00	2,960.00	Revise and rework proposed findings of facts and conclusions of law and prepare for trial.
6/29/2009	28	370.00	8.00	2,960.00	Prepare for trial. (Spent 10 hours; bill only 8 hours)
6/30/2009	28	370.00	7.50	2,775.00	Prepare for trial; meet with Mr. Horsley re trial issues.
7/1/2009	28	370.00	7.50	2,775.00	Prepare for trial; revise and finalize findings of fact and conclusions of law.

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7/2/2009	28	370.00	8.00	2,960.00	Prepare for trial (including extensive analysis of and determining rebuttals to expert report).
7/3/2009	28	370.00	7.00	2,590.00	Prepare for trial; finalize findings of fact and conclusions of law.
7/4/2009	28	370.00	6.00	2,220.00	Prepare for trial. (Hales cross-examination)
7/5/2009	28	370.00	3.00	1,110.00	Prepare for trial. (Opening statement)
7/6/2009	28	370.00	9.00	3,330.00	Prepare for trial; finalize findings of fact and conclusions of law.
7/7/2009	28	370.00	10.50	3,885.00	Read and outline rebuttals to Hales' findings of fact and conclusions of law, trial brief and in limine papers; prepare for trial.
7/8/2009	28	370.00	9.00	3,330.00	Prepare for trial.
7/9/2009	28	370.00	10.50	3,885.00	Prepare for trial; lengthy conference with Mr. Horsley re testimony and other case issues.
7/10/2009	28	370.00	11.00	4,070.00	Prepare for trial; conference with Mr. Horsley; conference with Mr. Horsley and Mr. Nielson re trial issues.
7/11/2009	28	370.00	12.00	4,440.00	Prepare for trial.
7/12/2009	28	370.00	7.50	2,775.00	Prepare for trial; conference with Mr. Horsley.
7/13/2009	28	370.00	4.00	1,480.00	Prepare for trial; revise cross-examination and expert report rebuttals draft memo to file to update these issues for next phase of trial preparation.
7/14/2009	28	370.00	1.00	370.00	Resolve expert report revision issues.
7/28/2009	28	370.00	8.00	2,960.00	Prepare for trial. (Primarily Hale cross-examination)
7/29/2009	28	370.00	6.00	2,220.00	Prepare for trial. (Primarily Lipzinski cross)
7/30/2009	28	370.00	7.00	2,590.00	Prepare for trial. (Primarily direct)
7/31/2009	28	370.00	7.00	2,590.00	Draft letter to counsel re trial issues; prepare for trial.
8/1/2009	28	370.00	7.50	2,775.00	Prepare for trial. (Opening statement and summation)
8/2/2009	28	370.00	4.00	1,480.00	Prepare for trial. (Opening statement and summation)
8/3/2009	16	250.00	8.00	2,000.00	Begin research on office memoranda re the economic loss doctrine; research Utah and other state case law regarding whether integration clause serves as evidence that reliance on inconsistent representations is unreasonable or unjustifiable; research case law re whether misrepresentation of what 'probably' can be done constitutes a presently existing fact.
8/3/2009	28	370.00	8.00	2,960.00	Prepare for trial; meet with Mr. Horsley re trial preparation.
8/4/2009	28	370.00	6.00	2,220.00	Prepare for trial. (Lipzinski issues)
8/5/2009	16	250.00	1.00	250.00	Begin researching case law re whether representation qualified by term 'probably' is sufficient to support negligent misrepresentation or fraud claim.
8/5/2009	28	370.00	8.00	2,960.00	Prepare for trial. (Cross, direct, opening and closing)
8/6/2009	16	250.00	5.00	1,250.00	Continue researching case law re whether representation qualified by term 'probably' is sufficient to support negligent misrepresentation or fraud claim; research Utah case law re standard on promises of future performance and when such promises are binding.
8/6/2009	28	370.00	10.00	3,700.00	Prepare for trial; conference with Mr. Nielson re numerous case issues.
8/7/2009	28	370.00	8.00	2,960.00	Prepare for trial. (including exhibit assembly and review)
8/8/2009	16	250.00	1.50	375.00	Research Utah case law re best evidence rule.
8/8/2009	28	370.00	7.00	2,590.00	Prepare for trial. (All phases)
8/9/2009	28	370.00	4.00	1,480.00	Prepare for trial. (All phases)
8/10/2009	28	370.00	12.00	4,440.00	Prepare for and conduct day 1 of trial; conference with Mr. Horsley to prepare for his testimony.
8/11/2009	28	370.00	9.00	3,330.00	Prepare for trial.

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8/12/2009	28	370.00	14.00	5,180.00	Prepare for and conduct trial; lengthy evening and late night meeting with Mr. Horsley to analyze revised expert report.
8/13/2009	28	370.00	12.00	4,440.00	Prepare for and conduct trial.
8/14/2009	28	370.00	4.50	1,665.00	Prepare Mr. Horsley for his testimony; prepare for Hale Jr. cross-examination; conduct day 4 of trial.
8/15/2009	28	370.00	6.00	2,220.00	Draft memo to file summarizing key testimony; outline arguments and assemble evidence for motion to dismiss Hale's misrepresentation claim; reorganize files for next phase of trial; telephone conference with Mr. Horsley re required action and completion of assigned tasks; outline additional rebuttals to revised expert report.
8/18/2009	28	370.00	3.25	1,202.50	Continue drafting summary of major trial testimony issues for inclusion in motion to dismiss fraud claim and final summation.
8/19/2009	28	370.00	2.50	925.00	Continue drafting list of inconsistencies in Hale testimony.
8/20/2009	28	370.00	1.50	555.00	Continue identifying Hale testimony contradictions.
8/22/2009	28	370.00	2.50	925.00	Begin drafting motion to dismiss misrepresentation claims.
8/24/2009	28	370.00	4.50	1,665.00	Draft motion to dismiss misrepresentation claims; research issue raised in Hale's opening statement re claim for unpaid profit not a lienable item.
9/3/2009	28	370.00	1.50	555.00	Revise and rework memo re motion for Rule 41(b) dismissal of misrepresentation claim.
9/4/2009	28	370.00	2.00	740.00	Continue revising motion to dismiss; locate additional deposition and other cites.
9/5/2009	28	370.00	1.25	462.50	Revise and rework dismissal memo.
9/7/2009	28	370.00	3.50	1,295.00	Begin drafting cross-examination outlines of rebuttals to approximately 25 separate challenges to revised expert report (schedules 2 and 11).
9/12/2009	28	370.00	1.00	370.00	Review and rework Rule 41(b) papers (spent 2 hours, bill only 1 hour).
9/16/2009	28	370.00	4.00	1,480.00	Prepare for and conduct meeting with Mr. Horsley to analyze Hales' revised expert report and identify numerous rebuttals.
9/18/2009	28	370.00	2.00	740.00	Continue analysis of rebuttals to expert report.
9/28/2009	28	370.00	3.50	1,295.00	Meet with Mr. Horsley to continue jointly analyzing Hales' expert report to locate numerous requested adjustments to schedules 2, 9 and 11.
9/30/2009	28	370.00	3.00	1,110.00	Meeting with Mr. Horsley to continue analyzing and rebutting dozens of claims charges in revised expert report.
10/3/2009	28	370.00	4.25	1,572.50	Lengthy meeting with Mr. Horsley re numerous additional rebuttals to schedule 2, 8, 9 and 11 of expert report.
10/7/2009	28	370.00	1.50	555.00	Revise and rework motion to dismiss misrepresentation claims; telephone conference with Mr. Horsley re trial preparation issues.
10/8/2009	28	370.00	1.50	555.00	Resume trial preparation.
10/10/2009	28	370.00	2.50	925.00	Prepare for trial.
10/12/2009	28	370.00	6.00	2,220.00	Lengthy meeting with Mr. Horsley to analyze all available rebuttals to expert report (Lipzinski) and determine which to use and prioritize; complete assembling of all documents necessary to cross-examine Lipzinski to establish \$350,000

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10/13/2009	28	370.00	2.00	740.00	Continue preparing for trial.
10/14/2009	28	370.00	2.00	740.00	Prepare for trial.
10/15/2009	28	370.00	1.25	462.50	Discuss with Mr. Horsley several trial testimony issues (both cross and direct); do same with Mr. Nielson.
10/16/2009	28	370.00	3.50	1,295.00	Prepare for trial.
10/17/2009	28	370.00	2.00	740.00	Prepare for trial.
10/19/2009	28	370.00	3.50	1,295.00	Prepare for trial.
10/20/2009	28	370.00	2.50	925.00	Prepare for trial.
10/21/2009	28	370.00	4.00	1,480.00	Prepare for trial (spent 6 hrs., billed only 4 hrs.).
10/22/2009	28	370.00	5.00	1,850.00	Read, analyze and outline rebuttals to Hales' supplemental trial brief; prepare for trial.
10/23/2009	28	370.00	6.00	2,220.00	Prepare for trial; meet with Mr. Horsley and Mr. Nielson to prepare them for trial testimony.
10/24/2009	28	370.00	6.00	2,220.00	Prepare for trial; research re apparent authority issues.
10/25/2009	28	370.00	5.00	1,850.00	Prepare for trial.
10/26/2009	28	370.00	9.50	3,515.00	Prepare for trial; meet with Mr. Horsley re trial testimony and Lipzinski report; draft summation outline; conference call with Mr. Nielson.
10/26/2009	23	90.00	0.40	36.00	Attention to check organization
10/27/2009	28	370.00	15.00	5,550.00	Prepare for and conduct day 5 of trial; prepare for Lipzinski cross examination.
10/28/2009	28	370.00	13.75	5,087.50	Prepare for and conduct day 6 of trial; prepare for Rob Nielson (expert) testimony.
10/29/2009	28	370.00	10.50	3,885.00	Prepare for and conduct trial; conference with Mr. Nielson re anticipated testimony.
10/29/2009	17	230.00	1.75	402.50	Research re striking expert testimony when testimony changes at trial.
10/30/2009	28	370.00	6.25	2,312.50	Dictate post-trial notes of key testimony and items to be included in findings of fact and conclusions of law; telephone conference with Mr. Horsley re same; begin drafting findings of fact and conclusions of law.
10/31/2009	28	370.00	2.50	925.00	Continue drafting and revising expanded FFCL's and memo of relevant trial points.
11/1/2009	28	370.00	2.50	925.00	Revise and rework FFCL's (Locating cites from post trial memo and exhibit books.)
11/2/2009	28	370.00	1.50	555.00	Draft rebuttals to Lipzinski report for inclusion in FFCL's.
11/3/2009	28	370.00	0.75	277.50	Continue drafting itemization of flaws in Lipzinski report for inclusion in FFCL's.
11/4/2009	28	370.00	1.00	370.00	Continue drafting and revising FFCL's.
11/5/2009	28	370.00	2.00	740.00	Listen to several portions of trial testimony to confirm factual findings; revise and rework FFCL's.
11/12/2009	28	370.00	3.00	1,110.00	Telephone conference with Mr. Horsley re Stroud Invoice issues; listen to trial audiotape of Stroud exchange; rework portions of FFCL's re flaws in expert report and Hale failure to prove damages.
11/13/2009	28	370.00	1.75	647.50	Revise and rework FFCLs, generally, and critiques of Lipzinski report, specifically.
11/16/2009	28	370.00	3.00	1,110.00	Assemble and read all Stroud documents, in limine papers and Stroud deposition to prepare for Nov. 20, hearing.
11/17/2009	28	370.00	2.75	1,017.50	Continue preparing for hearing on Stroud Invoices; revise and rework FFCLs; conduct research to rebut CitiBank equitable subrogation defense to thereby preserve priority of Big H trust deed.
11/18/2009	28	370.00	2.50	925.00	Revise and rework Lipzinski report section of FFCLs; prepare updated Stroud invoice chart.

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11/19/2009	28	370.00	3.25	1,202.50	Finalize FFCLs; lengthy meeting with Mr. Horsley to discuss and revise same and to prepare for Nov. 20 hearing on Stroud invoices.
11/20/2009	28	370.00	4.75	1,757.50	Prepare for hearing on Stroud invoices; meet with Mr. Horsley and Mr. Stroud to prepare Mr. Stroud's testimony; attend and conduct hearing; conference with Mr. Horsley re same; draft order and letter to counsel.
11/23/2009	28	370.00	2.25	832.50	Read and outline numerous rebuttals to Hales' memo opposing dismissal of fraud claims; lengthy telephone conference with Mr. Horsley re scope of reply memorandum.
11/24/2009	28	370.00	2.50	925.00	Read trial testimony cited in Hales' memo opposing dismissal of misrepresentation claims; draft Rule 41(b) reply memo.
11/25/2009	28	370.00	1.50	555.00	Continue drafting and revising rule 41(b) reply memo.
11/30/2009	28	370.00	0.20	74.00	Telephone conference with Mr. Horsley re FFCL issues
12/3/2009	28	370.00	1.75	647.50	Revise and rework FFCL's; forward same to and conduct telephone conference with Mr. Horsley.
12/4/2009	28	370.00	0.50	185.00	Lengthy telephone conference with Mr. Horsley re Findings of Fact and Conclusions of Law.
12/5/2009	28	370.00	0.80	296.00	Revise and edit reply memo for dismissal of fraud claims.
12/8/2009	28	370.00	0.60	222.00	Final edit reply memo re fraud claims; telephone conference with Mr. Horsley re additional rebuttals to Lipzinski report and topics to discuss at Dec. 10 meeting.
12/10/2009	28	370.00	3.50	1,295.00	Meet with Mr. Horsley to identify and quantify additional inaccuracies and flaws in Mr. Lipzinski's report.
12/11/2009	28	370.00	2.50	925.00	Revise and rework Lipzinski report section of FFCLs; read and reformat Mr. Horsley's additional charts of Lipzinski errors.
12/14/2009	28	370.00	2.00	740.00	Calculate Lipzinski schedule 3 defects; revise and rework FFCLs
12/15/2009	28	370.00	1.45	536.50	Telephone conference with Mr. Horsley re FFCL revisions; final proof and edit FFCLs
12/16/2009	28	370.00	0.60	222.00	Final edit of FFCLs; draft letter to court re same; telephone conference with Mr. Horsley.
12/29/2009	28	370.00	5.00	1,850.00	Read several hundred pages of trial transcript to confirm accuracy of FFCLs (spent 6.5 hours; bill only 5 hours.)
12/30/2009	28	370.00	4.25	1,572.50	Incorporate additional points from trial transcript into FFCL's; read final volume of transcript (Lipzinski cross-examination)
12/31/2009	28	370.00	0.75	277.50	Draft additional revision to FFCLs
1/4/2010	28	375.00	3.75	1,406.25	Read Hale's post trial submittals and prepare bullet point rebuttals for future references; read trial transcript to address points asserted in Hales' post-trial brief.
2/9/2010	28	375.00	3.75	1,406.25	Read Minute Entry Ruling; Telephone conference with Mr. Horsley re same; reread previously submitted FFCLs to determine scope and substance to required revisions; draft revised FFCLs; read Hales' 'Objections to FFCLs'; draft response to same; assemble time records; draft attorney fee and cost affidavit.

DIG N CONSTRUCTION

Billing Fees

2/10/2010	28	375.00	4.25	1,593.75	Continue drafting and revising FFCLs; carefully read Hales' objections and extensive portions of trial transcript to determine scope of potential revisions; draft judgment; research issues of "costs" recoverable under contract v. "costs" recoverable under Rule 54; revise response to Hales' objections; telephone conference with Mr. Horsley re several case issues.
2/11/2010	28	375.00	4.20	1,575.00	Revise and rework FFCLs; research recoverable costs; assemble and review time records; revise attorney fee and cost affidavit; draft judgment; finalize and file reply to Hales' objections to FFCLs; research and rebut argument re David Horsley 'Commission'; telephone conference with Mr. Horsley re several issues.
2/12/2010	28	375.00	3.50	1,312.50	Revise and final edit FFCLs; revise and rework attorney fee affidavit; research re recoverability of pre-judgment interest on attorney fee award.
2/13/2010	28	375.00	0.50	187.50	Revise and final edit attorney fee affidavit.
2/16/2010	28	375.00	0.75	281.25	Finalize affidavit of fees and costs.
2/17/2010	28	375.00	1.25	468.75	Rework and rewrite paragraph twelve of attorney fee affidavit; finalize FFCLs, judgment and letter to counsel; telephone conference with Mr. Horsley re same.
3/4/2010	28	375.00	0.25	93.75	Telephone conference with counsel and draft letter to court re submission of judgment and FFCLs; telephone conference with Mr. Horsley re same.
3/8/2010	28	375.00	0.6	225.00	Read and outline rebuttals to CitiMortgage objections to FFCLs and attorney fee affidavit; telephone conference with Mr. Horsley re same.
3/11/2010	28	375.00	1.5	562.50	Conduct legal research to rebut CitiMortgage's attorney fee allocation and recovery arguments.
3/12/2010	28	375.00	0.75	281.25	Continue assembling and reading attorney fee cases to rebut objections.
3/16/2010	28	375.00	2.5	937.50	Read CitiMortgage's objections to FFCLs and judgment; read and start outlining rebuttals to Hales' objections to FFCLs, attorney fees and judgment.
3/17/2010	28	375.00	3.25	1218.75	First draft of responses to first 22 objections to FFCLs; read relevant trial transcripts.
3/18/2010	28	375.00	2.75	1031.25	Continue drafting reply to objections to FFCLs; outline arguments against Hales' challenge to requested fees and costs.
3/19/2010	28	375.00	3.2	1200.00	Revise response to objections to FFCLs; draft response to objections to claimed fees and costs; telephone conference with Mr. Horsley re James' affidavit points and trial issues.
3/20/2010	28	375.00	1.5	562.50	Continue drafting response to objections to fees and costs.
3/22/2010	28	375.00	2.25	843.75	Continue drafting and revising responses to objections to FFCLs and attorney fee papers.
3/22/2010	23	90.00	0.5	45.00	Attention to McDonald time sheet.
3/23/2010	28	375.00	0.5	187.5	Revise responses to objections to FFCLs.
3/24/2010	28	375.00	1.25	468.75	Revise and rework attorney fee objection papers.
3/25/2010	28	375.00	4.25	1593.75	Run dozens of calculations to 'understand' reasons for Jones Waldo's billing rate reductions; conference with Mr. Horsley re FFCL and attorney fee arguments; draft James H. and second J. Anderson affidavit; revise and finalize responses.
3/25/2010	17	230.00	0.5	115.00	Research law re attorney fees.

Big H Construction

Billing Fees

3/26/2010	28	375.00	4.5	1687.50	Revise, supplement and rework papers responding to objections to FFCLs and attorney fee request; finalize supporting affidavits; telephone conference with Mr. Horsley; research additional rebuttals to attorney fee challenges; draft response to CitiMortgage opposition.
3/26/2010	17	230.00	0.5	115.00	Continue research re attorney fees provisions.
4/1/2010	28	375.00	0.25	93.75	Telephone conference with Mr. Horsley to answer his questions about numerous recently filed papers re FFCLs and attorney fees.
4/12/2010	28	375.00	0.25	93.75	Prepare Request to Submit for Decision (2 motions).
4/20/2010	28	375.00	0.9	337.50	Determine required action; draft, revise and finalize paper to recover additional attorney fees.

Total \$327,730.00

Less (\$2,100 of non-recoverable mediation fees)

Net Total \$325,630.00

COSTS

Detail Cost Transaction List

Date	Tmkr	Cost	Description
6/14/2005	28	5.00	Courier Costs
6/14/2005	28	33.00	Courier Costs / Pick up file in South Jordan
7/1/2005	28	5.00	Courier Costs
7/29/2005	28	350.00	Documentation Costs - First American Title Ins. Agency Inv# 82878
8/4/2005	28	210.00	Filing Fees - Third Dist. Ct./ File Counterclaim and Third Party Complaint
8/4/2005	28	12.00	Filing Fees - S.L. Co. Recorder/File Notice of Pendency of Action
8/4/2005	28	1.98	Postage Expenses
8/4/2005	28	5.00	Courier Costs
8/4/2005	28	5.00	Courier Costs
8/4/2005	28	11.00	Courier Costs
8/8/2005	28	50.00	Process Server Costs - Delaware Attorney Services/Serve Summons and Complaint
8/8/2005	28	19.43	Overnight delivery charges - FedEx Inv# 5-524-80671/to Delaware Atty. Services
8/15/2005	28	44.60	Photocopies
8/25/2005	28	5.00	Courier Costs
9/8/2005	28	0.60	Postage Expenses
9/8/2005	28	7.50	Courier Costs
9/27/2005	28	7.50	Courier Costs
9/28/2005	28	1.20	Postage Expenses
9/30/2005	28	12.00	Photocopies
10/5/2005	28	0.60	Postage Expenses
10/5/2005	28	0.37	Postage Expenses
10/5/2005	28	7.50	Courier Costs
10/15/2005	28	7.60	Photocopies
10/25/2005	28	0.37	Postage Expenses
11/22/2005	28	70.13	Outside Copy Costs - DataCopy Inv# 23534
11/22/2005	28	7.50	Courier Costs
12/30/2005	28	21.80	Photocopies
1/10/2006	28	0.39	Postage Expenses
1/18/2006	28	2.80	Photocopies
1/31/2006	28	7.60	Photocopies
3/6/2006	28	1.17	Postage Expenses
3/16/2006	28	3.00	Photocopies
4/4/2006	28	229.00	Outside Copy Costs - Jones Waldo Inv. dated 04/04/06
4/12/2006	28	192.03	Outside Copy Costs - Data Copy Inv# 24852
4/12/2006	28	7.50	Courier Costs
4/12/2006	28	9.45	Postage Expenses
4/18/2006	28	4.80	Photocopies
5/18/2006	28	2.31	Postage Expenses
5/18/2006	28	18.50	Witness Fees - Security National Life Ins.
5/18/2006	28	18.50	Witness Fees - Applied Lending Solutions
5/18/2006	28	18.50	Witness Fees - First Utah Bank
5/19/2006	28	7.50	Courier Costs
5/19/2006	28	7.50	Courier Costs
5/19/2006	28	7.50	Courier Costs

5/19/2006	28	27.00 Process Server Costs - Anderson Process Inv# 2006001562
5/24/2006	28	18.00 Process Server Costs - Anderson Process Inv# 2006001564
5/24/2006	28	27.00 Process Server Costs - Anderson Process Inv# 2006001563
5/24/2006	28	39.00 Process Server Costs - Anderson Process Inv# 2006001561
5/30/2006	28	7.50 Courier Costs
5/31/2006	28	38.00 Photocopies
6/7/2006	28	113.25
		Documentation Costs - Beehive Credit Union Inv. dated 06/07/06
6/14/2006	28	7.50 Courier Costs
7/5/2006	28	7.50 Courier Costs
7/7/2006	28	162.33 Outside Copy Costs - DataServices Inv# 5438
7/11/2006	28	2.31 Postage Expenses
7/11/2006	28	7.50 Courier Costs
7/12/2006	28	7.50 Courier Costs
7/18/2006	28	7.50 Courier Costs
7/31/2006	28	505.60 Photocopies
7/31/2006	28	7.50 Courier Costs
8/2/2006	28	7.50 Courier Costs
8/21/2006	28	81.02 Outside Copy Costs - DataCopy Inv# 26152
8/23/2006	28	911.87 Court Reporter Fees - CitiCourt Inv# 16776/depo of C. Hale
8/28/2006	28	6.00 Outside Copy Costs - Salt City Couriers Inv# 7659
8/31/2006	28	179.40 Photocopies
9/12/2006	28	7.50 Courier Costs
9/13/2006	28	7.50 Courier Costs
9/30/2006	28	179.40 Photocopies
10/11/2006	28	374.15 Court Reporter Fees - CitiCourt Inv# 17315/depo of B. Hale & C. Hale
10/13/2006	28	1.35 Postage Expenses
11/16/2006	28	4.20 Postage Expenses
11/29/2006	28	18.40 Photocopies
2/7/2007	28	185.65 Court Reporter Fees - Tempest Reporting Inv# 16433/depo of D. Horsely
2/22/2007	28	8.00 Legal Messenger Charges - Salt City Inv# 8329
2/23/2007	28	18.50 Witness Fees - Stock Building Supply
2/26/2007	28	15.00 Process Server Costs - Anderson Process Inv# 2007000600
2/28/2007	28	7.50 Courier Costs
3/19/2007	28	146.50 Courier Costs
3/20/2007	28	7.50 Courier Costs
3/20/2007	28	47.50 Courier Costs
3/21/2007	28	30.00 Process Server Costs - Anderson Process Inv# 2007000896
3/22/2007	28	87.00 Process Server Costs - Anderson Process Inv# 2007000878
3/22/2007	28	72.00 Process Server Costs - Anderson Process Inv# 2007000877
3/23/2007	28	51.00 Process Server Costs - Anderson Process Inv# 2007000929
3/26/2007	28	7.50 Courier Costs
3/26/2007	28	48.00 Process Server Costs - Anderson Process Inv# 2007000873
3/26/2007	28	30.00 Process Server Costs - Anderson Process Inv# 2007000872
3/27/2007	28	7.50 Courier Costs
3/28/2007	28	1.11 Postage Expenses
3/30/2007	28	30.76
		Outside Copy Costs - Jaussi & Christiansen Inv. dated 03/30/07

3/31/2007	28	87.00	Process Server Costs - Anderson Process Inv# 2007001000
4/3/2007	28	4.20	Postage Expenses
4/5/2007	28	6.00	Legal Messenger Charges - Salt City Inv# 8540
4/5/2007	28	25.20	Photocopies
4/9/2007	28	4.14	Postage Expenses
4/18/2007	28	8.40	Postage Expenses
5/10/2007	28	7.00	Legal Messenger Charges
5/11/2007	28	15.10	Legal Messenger Charges
6/4/2007	28	7.50	Courier Costs
7/12/2007	28	43.80	Miscellaneous charges for - Ready Made Builders Inv# 07-100/Copies & Mileage
7/18/2007	28	390.75	Court Reporter Fees - Tempest Reporting Inv# 16934/depo of J. Horsley
8/6/2007	28	543.05	Court Reporter Fees - Tempest Reporting Inv# 16937/depo of D. Horsley
8/17/2007	28	1.31	Postage Expenses
10/18/2007	28	10.50	Travel Expenses - J. Anderson/Mileage Reimbursement
1/30/2008	28	3.93	Postage Expenses
1/31/2008	28	7.50	Courier Costs
2/7/2008	28	101.27	Outside Copy Costs - DataCopy Inv# 31642
2/7/2008	28	9.20	Postage Expenses
2/29/2008	28	2000.00	Other Costs Advanced; Prospect (Rob Nielson)/Expert Services
3/17/2008	28	6.00	Legal Messenger Charges - Salt City Inv# 9989
3/27/2008	28	508.25	Court Reporter Fees - CitiCourt Inv# 24736/depo of J. Lipzinski
4/14/2008	28	272.60	Court Reporter Fees - Tempest Reporting Inv# 17611/Depo of R.D. Nielson
4/15/2008	28	1020.30	Expert Witness - R.D. Nielsen, P.C.
5/9/2008	28	10.42	Postage Expenses
5/21/2008	28	118.35	Court Reporter Fees - Tempest Reporting Inv# 17733/Depo of T. Stroud
7/31/2008	28	6.00	Legal Messenger Charges - Quick Step Courier Inv# 1
10/10/2008	28	1.34	Postage Expenses
10/10/2008	28	7.00	Legal Messenger Charges - Quick Step Courier Services
1/16/2009	28	7.00	Legal Messenger Charges - Quick Step Courier/Jan. 2009 Inv.
1/30/2009	28	22.09	Electronic Research - Westlaw Research Jan. 2009
2/6/2009	28	350.00	Documentation Costs - First American Title Ins. Agency Inv# 13131954
2/25/2009	28	66.40	Outside Copy Costs - Jones Waldo Holbrook Inv. Dated 02/25/09
6/16/2009	28	5.16	Postage Expenses
6/30/2009	28	8.00	Legal Messenger Charges - Quick Step Courier
6/30/2009	28	8.00	Legal Messenger Charges - Quick Step Courier
7/6/2009	28	8.00	Legal Messenger Charges - Quick Step Courier
7/9/2009	28	7.00	Legal Messenger Charges - Quick Step Courier
7/9/2009	28	7.00	Legal Messenger Charges - Quick Step Courier
7/10/2009	28	18.50	Witness Fees - T. Stroud
7/31/2009	28	7.00	Legal Messenger Charges - Quick Step Courier
7/31/2009	28	63.76	Electronic Research - Westlaw Research July 2009
8/6/2009	28	214.97	Outside Copy Costs - Salt Lake Legal Inv# 97675

8/6/2009	28	8.00 Legal Messenger Charges - Quick Step Courier
8/6/2009	28	8.00 Legal Messenger Charges - Quick Step Courier
8/6/2009	28	1597.50 Other Costs Advanced; R.D. Nielson/Expert Services
8/10/2009	28	32.00 Miscellaneous charges for - J. Anderson/Courthouse Parking
8/13/2009	28	569.63 Outside Copy Costs - Salt Lake Legal Inv# 96953
8/31/2009	28	13.69 Electronic Research - Westlaw Research Aug. 2009
8/31/2009	28	84.70 Electronic Research - Westlaw Research Aug. 2009
8/31/2009	28	1062.50 Other Costs Advanced; R.D. Nielson, PC, Inv# 004/Architecture Consultanting Experts
10/27/2009	28	24.00 Other Expenses -J. Anderson/Courthouse Parking 10/27 - 10/29
10/30/2009	28	9.06 Electronic Research WestLaw Research Oct. 2009
11/2/2009	28	12.00 Legal Messenger Charges - Quick Step Courier
11/20/2009	28	4.00 Miscellaneous charges for - J. Anderson/Courthouse Parking
11/30/2009	28	17.87 Electronic Research - Westlaw Research Nov. 2009
12/10/2009	28	2.44 Postage Expenses
12/28/2009	28	0.88 Postage Expenses
12/28/2009	28	0.61 Postage Expenses
12/31/2009	28	1.66 Electronic Research - Westlaw Research Dec. 2009
1/4/2010	28	8.00 Legal Messenger Charges - Quick Step Courier
1/4/2010	28	3.80 Postage Expenses
1/4/2010	28	2000.00 Other Costs Advanced; Robert Nielsen Inv. dated 01/04/10
2/8/2010	28	2.00 Miscellaneous charges for - J. Anderson/Courthouse parking
2/11/2010	28	0.88 Postage Expenses
2/17/2010	28	8.00 Legal Messenger Charges - Quick Step Courier
2/17/2010	28	2.58 Postage Expenses
2/23/2010	28	7.00 Legal Messenger Charges - Quick Step Courier
2/23/2010	28	12.00 Filing Fees - State of Utah/UCC Financing Statement
2/26/2010	28	26.67 Electronic Research - Westlaw Feb. 2010
3/4/2010	28	5.84 Postage Expenses
3/4/2010	28	2.75 Postage Expenses
3/15/2010	28	4.00 Legal Messenger Charges - Quick Step Courier
3/26/2010	28	9.60 Postage Expenses
3/31/2010	28	47.04 Electronic Research - Westlaw March 2010
4/13/2010	28	1.32 Postage Expenses
4/21/2010	28	1.22 Postage Expenses
Total		16,614.26

Tab 3

ANDERSON & KARRENBORG

John T. Anderson (#0094)
50 West Broadway, Suite 700
Salt Lake City, Utah 84101-2035
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Counsel for Big H Construction, Inc. and Dwayne Horsley

IMAGED

FILED DISTRICT COURT
Third Judicial District

MAY 25 2010
By 
SALT LAKE COUNTY
Deputy Clerk

**ENTERED IN REGISTRY
OF JUDGMENTS**
DATE 5/28/10

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

**CHARLES F. HALE and BEVERLY I.
HALE**, husband and wife,

Plaintiffs and Counterclaim Defendants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and **T. DWAYNE HORSLEY**,
an individual,

Defendants, Counterclaim Plaintiffs,
and Third-Party Plaintiffs,

vs.

CITIMORTGAGE, INC., a Delaware
corporation, **CITIBANK FEDERAL
SAVINGS BANK**, a federally chartered
savings bank, and **JOHN DOES I-V**,

Third-Party Defendants.

JUDGMENT

Civil No. 050905279

Judge Sandra N. Peuler

Judgment @J



JD31793481

pages: 4

050905279 HALE,CHARLES F

Trial in this matter was conducted on August 10, 12-14, October 27-29, and November 20, 2009. In its Minute Entry dated February 8, 2010, the Court issued several rulings to resolve many of the substantive issues presented at trial. In May 2010, the Court made and entered its

Findings of Fact and Conclusions of Law. Based on the foregoing, the Court now ORDERS, ADJUDGES and DECREES as follows:

1. Each of the seven claims asserted in plaintiffs' Amended Complaint against defendants, Big H Construction, Inc. ("Big H") and Dwayne Horsley ("Horsley"), shall be, and they hereby are, dismissed with prejudice as against both Big H and Horsley.

2. Big H shall be, and it hereby is, granted judgment against plaintiffs and counterclaim defendants, Charles F. Hale and Beverly I. Hale, for the principal sum of \$172,100, plus interest thereon at the rate of ten percent (10%) per annum from December 1, 2004 to the date on which this Judgment is entered, and thereafter at the rate of 2.41 percent (2.41%) per annum until paid.

3. Big H shall be, and it hereby is, granted judgment against Charles F. Hale and Beverly I. Hale for attorney fees and costs (for the period June 7, 2005 to April 20, 2010) in the principal amount of \$342,240.84, plus interest thereon at the rate of 2.41 percent (2.41%) per annum from the date on which this Judgment is entered until paid.

4. Big H Shall be, and hereby is granted judgment decreeing and declaring that Big H's Notice of [Mechanic's] Lien, dated February 22, 2005, and recorded as Entry No. 9304860 in the Office of the Salt Lake County Recorder, against the following real property ("Property") described as:

All of Lot 45, Triple Crown Estates Subdivision, according to the official plat thereof on file with the Salt Lake County Recorder,

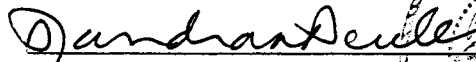
is a valid, subsisting and first priority lien against the Property, senior to any interest of Charles F. Hale, Beverly I. Hale and CitiMortgage, Inc. against the Property.

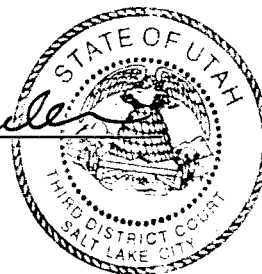
5. Big H shall be, and it hereby is, granted judgment against Charles F. Hale and Beverly I. Hale and CitiMortgage, Inc. that the Property be sold pursuant to the provisions of the Utah Mechanic's Lien Act, Utah Code Ann. §§ 38-1-1, *et seq.*, to satisfy all amounts owed by the Hales to Big H under this Judgment.

6. This Judgment may, at the request of Big H, be augmented to include future incurred (post-April 20, 2010) attorney fees and costs in an amount to be substantiated by affidavit to be filed with the Court and served on all counsel. Counsel are entitled to file objections to any such request(s).

DATED: May 25, 2010.

BY THE COURT:


Honorable Sandra N. Peuler
Third District Court Judge



APPROVED AS TO FORM:

JONES WALDO HOLBROOK & McDONOUGH, PC



Vincent C. Rampton
Attorney for Plaintiffs and Counterclaim Defendants

FABIAN & CLENDENIN, PC

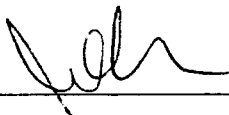
Bradley L. Tilt
Attorney for Third Party Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of May 2010, I caused a true and correct copy of
JUDGMENT to be served via first-class mail, postage prepaid, to the following:

Vincent C. Rampton
Kathleen McDonald
Jones Waldo Holbrook & McDonough, PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Bradley L. Tilt
Fabian & Clendenin, PC
215 South State Street, 12th Floor
Salt Lake City, Utah 84111-2323



Tab 4

FILED
THIRD DISTRICT COURT

2010 JUN -8 PM 4:06

SALT LAKE COUNTY
BY R. Grotesky
DEPUTY CLERK

Vincent C. Rampton (USB 2684)
Kathleen E. McDonald (USB 10187)
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Attorneys for Plaintiffs

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

CHARLES F. HALE and BEVERLY I.
HALE, husband and wife,

Plaintiffs and Counterclaim
Defendants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and T. DWAYNE HORSLEY,
an individual,

Defendants, Counterclaim
Plaintiffs, and Third-Party
Plaintiffs,

vs.

CITIMORTGAGE, INC., a Delaware
corporation, CITIBANK FEDERAL
SAVINGS BANK, a federally chartered
savings bank, and JOHN DOES I-V,

Third-Party Defendants.

**MOTION FOR NEW TRIAL, OR
TO AMEND FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
JUDGMENT**

Civil No. 050905279

Judge Sandra Peuler

Plaintiffs Charles F. Hale and Beverly I. Hale, by counsel and pursuant to Rule 59, Utah R. Civ. P., move the Court for an order directing a new trial of the above-entitled matter based on the insufficiency of evidence presented at trial to sustain the Courts findings and conclusions, and due to error in law. In the alternative and conjunction therewith, Plaintiffs move the court, pursuant to Rule 52 (b), Utah R. Civ. P., to amend its Findings of Fact, Conclusions of Law and Judgment entered herein to correct errors of fact and law therein.

A new trial, or amendment of the court's findings, conclusions and judgment, is warranted because the judgment amount reflects calculations that are erroneous mathematically, that exceed the amount proposed by either party, and that are based on erroneous legal applications.

During the trial, Plaintiffs' expert acknowledged that he had erred in some calculations and figures; on re-direct, he corrected himself. In the process, however, confusion apparently resulted. The Minute Entry dated February 8, 2010 relied on a method of calculating damages that neither party had proposed. Several components of that methodology err mathematically, as a matter of law, and are not supposed by sufficient evidence. Rule 59 provides for new trials for "[i]nsufficiency of the evidence to justify the verdict or other decision, or that it is against law" and for "error in law." Utah R. Civ. P. 59. The fact that the Court, and both parties all came to different calculations strongly suggests an error justifying a new trial.

New trial is also justified because the Judgment's final calculations: (1) erroneously include the cost of the lots; (2) credit duplicate invoices and include transcription errors (totalling nearly \$100,000); (3) include an arithmetic error; (4) give payment credits to Big H for payments

that Big H admits it did not pay; and (5) ignore warranty claim credits, also in error as a matter of law and based on insufficient evidence. These are manifest errors of both fact and law, and compel a new trial, or at a minimum, a correction of the court's rulings.

Plaintiffs' motion should be granted for those reasons set out in the accompanying memorandum of law.

DATED this 8th day of June, 2010.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

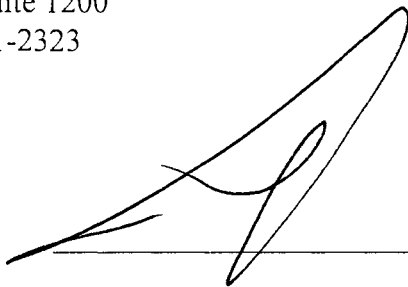
Vincent C. Rampton
Kathleen E. McDonald
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION FOR NEW TRIAL was sent via first class mail, postage prepaid, to the following this 8th day of June, 2010:

John T. Anderson
Anderson & Karrenberg
50 West Broadway, Suite 700
Salt Lake City, UT 84101

Robert J. Dale
Bradley L. Tilt
Fabian & Clendenin
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323

A handwritten signature in black ink, appearing to be 'R. Dale', is written over a horizontal line.

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THIRD DISTRICT COURT

2010 JUN -8 PM 4:04

Vincent C. Rampton (USB 2684)
Kathleen E. McDonald (USB 10187)
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Attorneys for Plaintiffs

SALT LAKE COUNTY
BY *R. G. [Signature]*
DEPUTY CLERK

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

CHARLES F. HALE and BEVERLY I.
HALE, husband and wife,

Plaintiffs and Counterclaim
Defendants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and T. DWAYNE HORSLEY,
an individual,

Defendants, Counterclaim
Plaintiffs, and Third-Party
Plaintiffs,

vs.

CITIMORTGAGE, INC., a Delaware
corporation, CITIBANK FEDERAL
SAVINGS BANK, a federally chartered
savings bank, and JOHN DOES I-V,

Third-Party Defendants.

**MEMORANDUM IN SUPPORT
OF MOTION FOR A NEW
TRIAL, OR TO AMEND
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
JUDGMENT**

Civil No. 050905279

Judge Sandra Peuler

Plaintiffs and Counterclaim Defendants Charles F. Hale and Beverly I. Hale, through counsel and pursuant to Utah R. Civ. P. 7 and 59, submit the following memorandum in support of their Motion for a New Trial, or to Amend Findings of Fact, Conclusions of Law and Judgment.

INTRODUCTION

Rule 59 provides for new trials for “[i]nsufficiency of the evidence to justify the verdict or other decision, or that it is against law” and for “error in law.” Utah R. Civ. P. 59. A motion for new trial has been held the proper vehicle to address an award of damages not supported by the evidence presented at trial – *see Crookston v. Fire Insurance Exchange*, 817 P. 2d 789 (Utah 1991); *Bennion v. LeGrand Johnson Construction Company*, 701 P. 2d 1078 (Utah 1985)

It is submitted, with respect, that the findings, conclusions and judgment in this matter need to be amended, or a new trial ordered, in that the judgment amount reflects calculations that are erroneous mathematically, that the award exceeds the amount proposed by either party, and that findings, conclusions and judgment are based on erroneous legal applications.

It is clear from the record in this matter that the findings, conclusions and judgment entered herein were the result of confusion. The Minute Entry dated February 8, 2010 reflected a damages figure higher than Defendants themselves proposed. It was based on a calculation that no party or expert proposed, and erred because it failed to consider the payments made by the Hales. The fact that the Court’s figures varied so significantly from any urged by the parties (or from any version offered by Defendants) strongly suggests an error justifying either amendment of the Court’s rationale and judgment or a new trial. In addition, amendment of the court’s

findings or new trial is warranted because of other errors of fact and law underlying the Judgment. The Judgment's final calculations: (1) erroneously include the cost of the lots; (2) credit duplicate invoices and includes transcription errors (totalling nearly \$100,000); (3) include an arithmetic error; (4) give payment credits to Big H for payments that Big H admits it did not pay; and (5) ignore warranty claim credits, also based on insufficient evidence. These are errors in law and based on insufficient evidence to justify the verdict, thereby compelling a new trial, or at a minimum, a correction of the verdict.

I. MINUTE ENTRY CALCULATION ERROR

The Court's Minute Entry ruling, on which its Findings, Conclusions and Judgment were based, concludes that the Hales owe \$174,000 in builders profit to Big H. Because the mechanics lien was for \$165,000, it concludes that the lien was reasonable. However, it suffers from a significant error.

For its calculation, the Minute Entry added together the two lists of invoices (Defendants' Exhibits RR and SS), multiplied that by the ten percent for the builder's profit and subtracted a \$100,000 payment that the Hales had paid toward "builder's profit". The Minute Entry reasoned the that remainder must be what was owed. However, this rationale ignores a crucial component: the total paid by the Hales on the total lists of invoices.

This case involved not one lot or house, but two. Only Hales and their expert attempted to come to grips with the total paid, versus the total owed, on both projects. With respect, it is submitted that the Court's method of calculation disregarded unrebutted evidence accounting for all payments and invoicing, and opted for a shorthand approach that did not reflect the reality of

the project. This is manifest from the fact that the Court's figure nowhere derives from the evidence presented by either party.

In their first Proposed Findings of Fact and Conclusions of Law, dated January 4, 2010, Defendants took a number (\$1,494,257) and identified that as the amount of the Costs for the Lot 45 Home.¹ Problematically, that figure cannot be found in Exhibit RR, the expert reports, or Defendants new calculation in their exhibit A. Defendants then added the cost of the lot, and divided the sum by ten percent. From that, Defendants asserted that the builder's profit fee was to be \$1,628,757² – less than what the Court ultimately awarded.

For their part, Hales established a global figure based on total valid charges versus total payments. These were not rebutted by Defendants' accounting efforts (which, between their internal inconsistency, their incompleteness regarding payments made directly by Hales and their duplication errors, as discussed below, were shown to be unreliable), and were certainly not rebutted by Defendants' expert, who only examined one lot.

Two conclusions must be drawn. First, there is an extensive level of confusion over the proper calculations, which resulted in significant errors and warrants a new trial. Second, the Court's calculation is based on an error of law and is not supported by the evidence, where it is higher than the Defendants' asserted. A new trial is warranted; alternatively, it is submitted with

¹[First] Proposed Findings of Fact and Conclusions of Law, dated January 4, 2010, at ¶ 34.

²*Id.*

respect that the Court needs to review the evidence and amend its findings to reflect the accounting information provided.

II. LOT COST ERROR

The inclusion of the cost of the lots in the calculation of the builder's profit is an error of law and is not supported by the evidence.

Lot cost inclusion was not supported by the evidence, simply, because Defendants' own expert testified that it would only be appropriate to add lot costs if there were an express agreement allowing it, which there indisputably was not in this case. Even on direct, Defendants' expert, Robert Nielson, testified that the land should only be included in the calculations when the contract so provides. Mr. Nielsen testified that "Typically, they're not. Unless there's some other agreement that, that would cause a fee to be attached to that." Likewise, Plaintiffs' expert did not support the use of the lot cost in the builder's profit calculations and testified as to the reasons why.

Inclusion of the lot costs was also an error of law because it violates the Statute of Frauds and gives a real estate commission to an entity that is not authorized to receive it under the Utah Code. The Statute of Frauds expressly requires that all contracts giving a commission for the sale of real property be in writing. "The following arrangements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement: . . . (5) every agreement authorizing or employing an agent or broker to

purchase or sell real estate for compensation.” Utah Code Ann. § 25-5-4 (2003).³ Giving Big H ten percent of the cost of the lots would effect a violation of this statute.

In addition, inclusion of lot costs in the Court’s analysis violated the Utah Code’s system for licensing real estate agents and brokers because it gives a commission on the sale of real estate where neither Defendant is authorized to receive such a payment. Only licensed real estate agents and brokers may take commissions. Utah Code Ann. § 61-2-4 requires that “one act, for valuable consideration, of buying, selling, leasing, managing, or exchanging real estate for another, ... requires the person performing ... the act to be licensed as a professional real estate broker, an associate real estate broker, or a real estate sales agent as set forth in this chapter.”

There is no evidence that Big H, Dwayne Horsley or James Horsley are licensed realtors. (James Horsley was specifically asked, and he testified that he is not a licensed realtor. *Trans VI at 147.*)

There is no writing that provides that Big H may take a commission on the lots. Accordingly, Big H is not entitled to add the cost of the lots to the builder’s profit.

III. DUPLICATES AND TRANSCRIPTION ERRORS

The Court’s Judgment relies on adding Defendants’ Exhibit RR and SS. Those Exhibits, however, contain duplicate invoices. It is easily and objectively ascertainable that that method double charges the Hales. Exhibit RR Item 38 Invoice 4536 and Exhibit 34 SS Item 37 Invoice 4536 for CJ Heating are the same— a duplicate. The amount is \$17,985. Exhibit 34 (SS) Item 45 Invoice 1011 is listed twice from RT Custom Cabinets for \$21,000. Also, the summary pages of

³The Statute of Frauds was amended in 2004, but it did not change the substance of this subsection.

the Exhibits, on which the Judgment relies, incorrectly transcribes a figure from an invoice. Exhibit SS Item 24 lists Invoice 4601 from Stroud at \$120,000, but the invoice is only \$60,000. The errors, totaling almost \$100,000 warrant new trial, or at a minimum, correcting the judgment.

In addition, the Court's reliance on these erroneous figures is not supported by the evidence. Plaintiffs' expert testified the amount quoted in Exhibit RR was inaccurate. That testimony was undisputed because Defendants' expert did not verify the invoices or look for duplicates.

IV. MATH ERROR

The Judgment is based on a math error. The totals of Exhibits RR and SS add up to \$2,000 less than indicated. To the extent that the Judgment, Minute Entry, and proposed Findings of Fact and Conclusions of Law ignore this, they are not based on sufficient evidence.

V. PAYMENTS CREDITED TO BIG H THAT BIG H DID NOT PAY

A review of the accounting information presented by Defendants reveals numerous instances in which Big H paid a subcontractor less than the amount that the subcontractor had invoiced to Big H – yet Big H asked (and the Court awarded) builder's profit on the invoiced amount. There was no evidence presented that Big H paid the entire invoiced amount in any of these instances. Because the Judgment relies on merely adding together all of the invoiced costs, therefore, it credits Big H with payment that Big H never made.

There was no evidence given supporting the credit to Big H for payments that it did not make. In fact, *both experts* testified that should not be done. Likewise, it is an error of law to

credit Big H payments that it never made. “‘Damages’ is commonly defined as ‘the estimated money equivalent for detriment or injury sustained.’” *Eleopulos v. McFarland and Hullinger, LLC*, 2006 UT App 352, ¶ 13, 145 P.3d 1157. It is “compensation for loss or injury.” *Id.* If Big H never expended the funds, it was not damaged in the full amount of the invoice.

Likewise, the law specific to proper allowances in a cost-plus contract holds that unpaid invoice amounts cannot be credited to the contractor. The owner can only be charged reasonable costs in a cost plus contract. The full invoiced amount cannot be considered a reasonable cost when a contractor pays less than an invoiced amount. In a cost plus contract, the contractor “must itemize each expenditure made by him.” *Burdette v. Durshell*, 837 So.2d 54 (La.App. 2002); see also 17A Am.Jur.2d *Contracts* § 495 (stating that in a cost plus contract, the contractor has the duty to “itemize “each and every expenditure made by him.”). “Presentation of invoices and statements of account, accompanied by proof of payment is the proper method of proving the expense or costs....” 17A Am.Jur.2d *Contracts* § 495; see also *Goetz v. Boyer*, 891 N.E.2d 182 (Ind. App. 2008) (table) (quoting same); *Burdette*, 837 So.2d at 66 (rejecting a claimed charge “since it was not proven to have been paid.”). Accordingly, only the paid costs are proper as a matter of law – except where a contractor inexplicably overpays an invoice – then the invoiced amount is the reasonable cost.

The Rules of Evidence also support this conclusion. The invoices themselves are evidence only that they were received by Big H. Technically, invoices in this context are hearsay, *see* Rule 801. By its verbiage, Rule 803(6) allows admission of records “made” in the course of regularly conducted business activity. In this case, Big H did not “make the record[s];”

it received them. As such, the invoices only evidence that Big H received them, not that it paid them. Therefore, the invoices alone are not sufficient to prove “costs” in what is indisputably a cost-plus-ten- percent contract. The payments also must be considered. Accordingly, the Court wrongly relied on Exhibits RR and SS as the measure of the cost in the cost plus contract. A new trial, or amendment of the Court’s findings, is required to set out the correct calculation of damages, if any.

VI. IGNORED WARRANTY CLAIMS

Both experts testified that warranty work needed to be completed on the houses, in order to bring them into compliance with industry standards. Yet, the Judgment fails to consider the cost of those repairs in its calculation. To that extent also, it is not based on sufficient evidence.

The Minute Entry and Judgment state or imply that Plaintiffs waived their claim for warranty repairs. That is an error of law. Waiver requires a knowing and voluntary relinquishment. *Doctors’ Co v. Drezga*, 2009 UT 60, ¶ 15, 218 P.3d 598 (citing *Continental Ins. Co. v. Kingston*, 2005 UT App 233, ¶ 9, 114 P.3d 1158). Mrs. Hale testified that she understood that the builders’ profit would be payable after the Hales had received a complete accounting for the project. *Trans III* at 35. While the Hales were given a packet of receipts just before Big H filed its lien, it is undisputed that no accounting was given to the Hales until the litigation was well underway. Likewise, in regard to Mr. Anderson’s argument on this point, Mr. Hale testified “We haven’t got the project finished by our view.” *Trans III* at 9. By his own admission, Mr. Horsley walked off the job of his own volition, before Plaintiffs deemed it completed, thus affording no opportunity for the contractual “walk through.” Because the Hales did not believe

that the project had closed, they did not knowingly and voluntarily waive their right to have the warranty work completed.

VII. INCORPORATION OF OBJECTIONS TO FINDINGS AND CONCLUSIONS

As additional and supplemental bases for their motion, Plaintiffs incorporate by reference the arguments offered in their Objections to Findings of Fact and Conclusions of Law filed with the Courton March 16, 2010 herein. For the reasons more fully set out in that submittal, as well as those set out herein, this matter should be retried in order to clarify legal and factual errors manifest in the Court's rulings; alternatively, and if the Court feels that sufficient evidence presently exists of record to address all of the issues now before it, the Findings, Conclusions and Judgment should be amended accordingly.

CONCLUSION

Plaintiffs recognize that motions under Rules 52(b) and 59 are addressed to the sound discretion of the trial court. Where, however, the result of a trial to the court results in factual findings and legal conclusions at odds with the evidence presented at trial, serious consideration should be given whether a re-presentation of the case would not best serve the interests of justice.

Here, the competing and changed calculations of costs, payments, and profits undoubtedly caused confusion. Apparently in response to that confusion, the Judgment relied on a simple method of calculating those damages. That method was endorsed by neither party or expert. The Judgment's sum, similarly, was higher than that proposed by either party. The differing and changed calculations are unfortunate, but permitting the resulting confusion to

stand is significantly prejudicial to the Plaintiffs. As such, a new trial, or amended findings, is required.

DATED this 8th day of June 2010.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

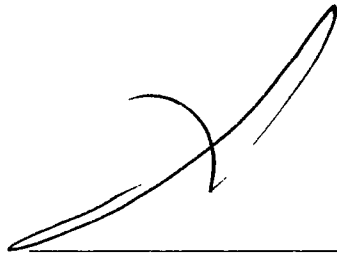
Vincent C. Rampton
Kathleen E. McDonald
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL was mailed via first class
mail, postage prepaid, to the following this 8th day of June 2010:

John T. Anderson
Anderson & Karrenberg
50 West Broadway, Suite 700
Salt Lake City, UT 84101

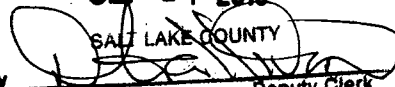
Robert J. Dale
Bradley L. Tilt
Fabian & Clendenin
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323



Tab 5

FILED DISTRICT COURT
Third Judicial District

SEP 27 2010

By  **SALT LAKE COUNTY**
Deputy Clerk

ANDERSON & KARRENERG

John T. Anderson (#0094)
50 West Broadway, Suite 700
Salt Lake City, Utah 84101-2035
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Counsel for Big H Construction, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

CHARLES F. HALE and BEVERLY I.
HALE, husband and wife,

Plaintiffs and Counterclaim Defendants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and **T. DWAYNE HORSLEY**,
an individual,

Defendants, Counterclaim Plaintiffs,
and Third-Party Plaintiffs,

vs.

CITIMORTGAGE, INC., a Delaware
corporation, **CITIBANK FEDERAL**
SAVINGS BANK, a federally chartered
savings bank, and **JOHN DOES I-V**,

Third-Party Defendants.

)
)
)
)
) **ORDER (1) DENYING HALE'S MOTION**
) **FOR NEW TRIAL, (2) DENYING**
) **HALES' MOTION TO AMEND**
) **FINDINGS OF FACT, CONCLUSIONS**
) **OF LAW AND JUDGMENT, AND (3)**
) **GRANTING JUDGMENT FOR**
) **ADDITIONAL ATTORNEY FEES AND**
) **COSTS**

) Civil No. 050905279

) Judge Sandra N. Peuler

On August 12, 2010 at 10:00 a.m., the Court conducted a hearing on several motions (collectively "Motions") in this case. The Motions are: (1) Hales' Motion for New Trial ("New Trial Motion"), (2) Hales' Motion to Amend Findings of Fact, Conclusions of Law and Judgment under Rule 52(b) ("Amendment Motion"), (3) Hales' Motion for Order Setting Amount of Supersedeas Bond ("Supersedeas Motion"), and (4) Big H's oral motion to inspect property ("Property Inspection Motion"). The Hales were represented at the hearing by their counsel, Vincent C. Rampton of Jones, Waldo, Holbrook & McDonough. Big H was represented by its counsel, John T. Anderson of Anderson & Karrenberg.

The Court having read and considered the parties' extensive memoranda and materials in support of, and in opposition to, the Motions; having heard and considered the arguments and representations of counsel; having announced on the record its rulings on the Motions; having subsequently issued its Minute Entry dated September 10, 2010 granting Big H's second and third supplemental motions for attorney fees and costs; and good cause appearing for the entry of an order formally embodying these rulings, it is hereby

ORDERED:

1. The New Trial Motion shall be, and hereby is, denied for the reasons set forth in Big H's written opposition and at the hearing, some of which were expressly referenced on the record by the Court in its ruling at the hearing.

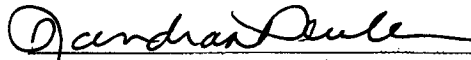
2. The Amendment Motion shall be, and hereby is, denied for the reasons set forth in Big H's written opposition and at the hearing, some of which were expressly referenced on the record by the Court in its ruling at the hearing.

3. The Supersedeas Motion has been resolved by separate Court order, and the Property Inspection Motion has been resolved by counsel and/or rendered moot.

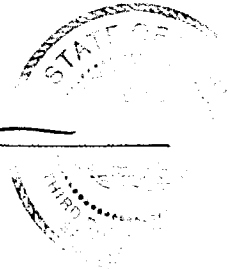
4. Pursuant to the Court's Minute Entry, dated September 10, 2010, Big H shall be, and hereby is, granted judgment against the Hales for additional attorney fees and costs for the period April 21 to August 12, 2010 in the aggregate amount of \$20,872.22, which amount shall be, and hereby is, an augmentation to, and is to be included with, the amounts set forth in that certain Judgment in this case dated and entered May 25 and May 28, 2010.

DATED: September 24, 2010.

BY THE COURT:



Honorable Sandra N. Peuler
Third District Court Judge



APPROVED AS TO FORM:

ANDERSON & KARRENBURG



John T. Anderson
Attorney for Big H Construction, Inc.

JONES WALDO HOLBROOK & McDONOUGH, PC



Vincent C. Rampton
Attorney for Plaintiffs and Counterclaim Defendants

FABIAN & CLENDENIN, PC

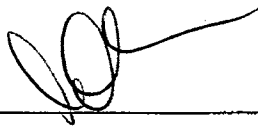
Bradley L. Tilt
Attorney for Third-Party Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of September 2010, I caused a true and correct copy of the foregoing **ORDER (1) DENYING HALES' MOTION FOR NEW TRIAL, (2) DENYING HALES' MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, AND (3) GRANTING JUDGMENT FOR ADDITIONAL ATTORNEY FEES AND COSTS** to be mailed via first- class, postage prepaid, to the following:

Vincent C. Rampton
Jones Waldo Holbrook & McDonough, PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Bradley L. Tilt
Fabian & Clendenin, PC
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Tab 6

Vincent C. Rampton (USB 2684)
Kathleen E. McDonald (USB 10187)
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Attorneys for Plaintiffs

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

CHARLES F. HALE and BEVERLY I.
HALE, husband and wife,

Plaintiffs and Counterclaim
Defendants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and T. DWAYNE HORSLEY, an
individual,

Defendants, Counterclaim Plaintiffs,
and Third-Party Plaintiffs,

vs.

CITIMORTGAGE, INC., a Delaware
corporation, CITIBANK FEDERAL
SAVINGS BANK, a federally chartered
savings bank, and JOHN DOES I-V,

Third-Party Defendants.

NOTICE OF APPEAL

Civil No. 050905279

Judge Sandra Peuler

Notice is hereby given, pursuant to Rule 4, Utah R. App. P., that Plaintiffs Charles F.
Hale and Beverly I. Hale, by counsel, appeal to the Utah Supreme Court the final judgment

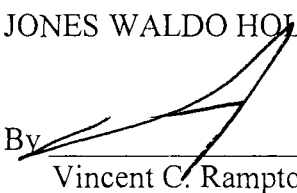
entered in the above-entitled matter by The Honorable Sandra Peuler on May 25, 2010; also, the Court's order denying Plaintiffs' Motion for New Trial, announced August 12, 2010, herein.

This appeal is taken from the entire final judgment.

DATED this 10th day of September, 2010.

JONES WALDO HOLBROOK & McDONOUGH PC

By



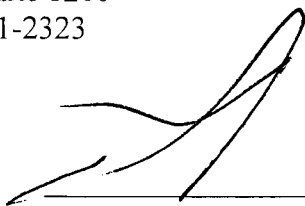
Vincent C. Rampton
Kathleen E. McDonald
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Appeal was mailed via first class mail, postage prepaid, to the following this 10th day of September, 2010:

John T. Anderson
Anderson & Karrenberg
50 West Broadway, Suite 700
Salt Lake City, UT 84101

Bradley L. Tilt
Fabian & Clendenin
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323



Tab 7

Vincent C. Rampton (USB 2684)
Kathleen E. McDonald (USB 10187)
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Email: vrampton@joneswaldo.com
Attorneys for Plaintiffs

FILED
THIRD DISTRICT COURT

10 SEP 30 AM 11:17

SALT LAKE DEPARTMENT

BY K. Gotapas
DEPUTY CLERK

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

CHARLES F. HALE and BEVERLY I.
HALE, husband and wife,

Plaintiffs and Counterclaim
Defendants,

vs.

BIG H CONSTRUCTION, INC., a Utah
corporation, and T. DWAYNE HORSLEY, an
individual,

Defendants, Counterclaim Plaintiffs,
and Third-Party Plaintiffs,

vs.

CITIMORTGAGE, INC., a Delaware
corporation, CITIBANK FEDERAL
SAVINGS BANK, a federally chartered
savings bank, and JOHN DOES I-V,

Third-Party Defendants.

AMENDED NOTICE OF APPEAL

Civil No. 050905279

Judge Sandra Peuler

Notice is hereby given, pursuant to Rule 4(b)(2), Utah R. App. P., that Plaintiffs Charles F. Hale and Beverly I. Hale, by counsel, appeal to the Utah Supreme Court the final judgment

entered in the above-entitled matter by The Honorable Sandra Peuler on May 25, 2010; also, the Court's Order (1) Denying Hales' Motion for New Trial, (2) Denying Hales' Motion to Amend findings of Fact, Conclusions of Law and Judgment, and (3) Granting Judgment for Additional Attorney Fees and Costs, entered September 27, 2010 herein. This appeal is taken from the entire final judgment. This Amended Notice of Appeal supersedes the Notice of Appeal filed September 10, 2010 herein.

DATED this 30th day of September, 2010.

JONES WALDO HOLBROOK & McDONOUGH PC

By

Vincent C. Rampton
Kathleen E. McDonald
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Appeal was mailed via first class mail, postage prepaid, to the following this 30th day of October, 2010:

John T. Anderson
Anderson & Karrenberg
50 West Broadway, Suite 700
Salt Lake City, UT 84101

Bradley L. Tilt
Fabian & Clendenin
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323

